

Note

The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties

I. INTRODUCTION

The tort liability of architects¹ has undergone a nearly full circle evolution through the history of modern civilization, from the strict liability theory of ancient Babylon² to recent attempts to again expose architects to strict liability.³ Under the Babylonian Code of Hammurabi, an architect was liable for any injuries resulting from a building that he designed.⁴ The remedy was harsh: the same injury was inflicted upon the architect as his building had caused.⁵ This notion of strict liability continued under the Roman principle of *lex talionis* ("an eye for an eye; a tooth for a tooth").⁶

Later, however, civilizations began to temper this view and limit the architect's liability. Under the English and early American common law, liability was limited to instances involving fraud or collusion by the architect.⁷ The architect's liability expanded when the English common law adopted a negligence theory.⁸ American courts eventually followed.⁹ This change, however, did not benefit injured third parties since an architect was immune from suit when privity of contract¹⁰ between the architect and the third party was lacking. In the 1950s the architect in the United States was still immune from suits by third parties¹¹ and under only a limited duty to those who were in privity of contract.¹² At this point American courts began the

1. This Note is primarily concerned with the legal status of architects, but the legal analysis is equally applicable to engineers and, to a lesser extent, design professionals in general. In fact, some of the cases cited herein involved engineers, indicating that architects and engineers are being exposed to the same liability problems. The legal principles applicable to one are generally applicable to the other. Allen, *Liabilities of Architects and Engineers to Third Parties*, 22 ARK. L. REV. 454, 454 (1968). But see *Rabinowitz v. Hurwitz-Mintz Furniture Co.*, 19 La. App. 811, 133 So. 498 (1931) (distinguishing architects from engineers).

2. C. EDWARDS, *THE HAMMURABI CODE* §§ 229-33, at 65-66 (1971).

3. See *infra* subpart IV(A).

4. C. EDWARDS, *supra* note 2, §§ 229-33, at 65-66.

5. For example, if a person's child was killed, the architect's child was killed; if an arm was lost, the architect's arm was removed; and if a third party was killed, the architect was put to death. *Id.*

6. "The law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another." BLACK'S LAW DICTIONARY 822 (5th ed. 1979).

7. Note, *The Architect's Tort Liability for Personal Injury*, 17 DRAKE L. REV. 242, 242 (1968).

8. Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 FED'N INS. COUNS. Q. 41, 41 (1978).

9. *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir. 1971); see W. PROSSER, *THE LAW OF TORTS* § 30, at 143 (4th ed. 1971); see also *infra* text accompanying notes 124-39.

10. See *Le Lievre v. Gould*, 1 Q.B. 491, 497-98 (1893); *Winterbottom v. Wright*, 152 Eng. Rep. 402, 404 (Ex. Ch. 1842); see also *infra* subpart II(A)(1).

11. See *infra* subpart II(A)(1).

12. See *infra* subpart II(A)(2) for a discussion of the expansion of the architect's duty.

assault on architects' legal status that has left them exposed to increased liability, including liability to third parties. The extent of this expansion has led some to conclude that the architect is approaching a legal position similar to that of architects in ancient Babylon.¹³

The purpose of this Note is to analyze the recent expansion of the architect's liability to third parties. This Note will not expressly deal with the architect's relationship to primary parties, although the discussion may be equally applicable. It will consider the expansion of an architect's liability for personal injury to third parties,¹⁴ including the many sources of the expansion and the appropriateness of each.¹⁵ In addition, this Note will examine the two primary areas of expansion—(1) preparation of drawings, plans, and specifications, and (2) construction supervision—and the architect's role in each of these areas today.¹⁶ Despite the broad expansion of liability, architects have retained some defenses and other sources of protection. This Note will analyze these defenses and their effectiveness in light of recent trends toward expansive liability.¹⁷ Last, this Note will discuss the impact of the expansion of architectural liability and the possible consequences to the profession and society if this trend continues.¹⁸

II. EXPANSION OF LIABILITY

Over the last thirty years architects have been exposed to expanding liability from a variety of sources. The fall of the privity requirement,¹⁹ abolition of the owner acceptance rule,²⁰ application of the time of discovery rule to tort statutes of limitation,²¹ and other changes²² have led to the expansion of the architect's liability to third parties. Another important element in this expansion is the changing duty of the architect, a topic that will be discussed later.²³

13. Comment, *A Defense Catalogue for the Design Professional*, 45 UMKC L. REV. 75, 78 n.22 (1976-1977).

14. This Note does not discuss the architect's contract liability, although many of the same principles are applicable.

For a discussion of the architect's liability to third parties for economic injury, see Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME LAW. 306, 309-11 (1977).

15. See *infra* parts II-IV.

16. See *infra* subparts III(B)-(C).

This Note does not attempt to analyze all areas in which architects may be held liable. It will deal only with liability to third parties with emphasis on the design and supervision functions. See Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221, 1229 n.49 (1973) for a list of 24 services performed by design professionals, each of which may draw allegations of negligence.

17. See *infra* part V.

18. See *infra* part VI.

19. See *infra* subpart II(A).

20. See *infra* subpart II(B).

21. See *infra* subpart II(C).

22. See *infra* subpart II(D).

23. See *infra* subparts III(B)-(C).

A. *Fall of Privity*

1. *Limitation of Potential Plaintiffs by the Privity Requirement*

The doctrine of privity of contract defines the scope of a person's liability to third parties for the breach of a contract. Under the doctrine, only a party to the contract may recover for a breach of the contract.²⁴ In the context of negligence, privity of contract has been applied as a limitation on the scope of liability to third parties for breaches of contractual duties.²⁵ Therefore, liability for negligence has been limited, in some circumstances, to contracting parties.

For an architect the number of contracting parties is limited. Two contracts are usually involved: one between the architect and the owner²⁶ (the party who is financing the construction) and one between the contractor and the owner.²⁷ The general privity rule would hold an architect liable only to the owner since the architect is generally not a party to the contractor-owner agreement.²⁸ Since third parties, by definition, are not parties to the contract, the architect would not be liable to them.

Historically, some exceptions were made to the privity requirement in negligence suits based on a contractual duty. One exception applied when a defendant had made misrepresentations to a third-party plaintiff who was injured as a consequence of his reasonable reliance on the erroneous information.²⁹ Another instance when a third party could recover was when he was held to be a "third-party beneficiary" of the contract.³⁰ This theory, which has been applied to architects,³¹ allowed an injured

24. Note, *supra* note 14, at 307.

25. *Id.*

26. See, e.g., AMERICAN INSTITUTE OF ARCHITECTS, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (AIA Document B141/CM) (1980) [hereinafter cited as AIA Document B141/CM], reprinted in J. LAMBERT & L. WHITE, HANDBOOK OF MODERN CONSTRUCTION LAW at 328 (1982).

27. See, e.g., AMERICAN INSTITUTE OF ARCHITECTS, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR (AIA Document A101/CM) (1980), reprinted in J. LAMBERT & L. WHITE, HANDBOOK OF MODERN CONSTRUCTION LAW at 236 (1982).

28. Generally, both forms are provided by the architect. Therefore, the owner-contractor agreement may be used to clear up ambiguities in the owner-architect agreement concerning the architect's responsibilities. *Reber v. Chandler High School Dist. No. 202*, 13 Ariz. App. 133, 136, 474 P.2d 852, 855 (1970).

29. See generally Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966) (discussion of liability to third parties for misrepresentation). The misrepresentation exception has limited application to architects. To show misrepresentation, the injured party must have reasonably relied on the erroneous information. W. PROSSER, *supra* note 9, § 108, at 714. Generally, the injury will be an economic one, e.g., when a bidder relies on the architect's information and then suffers an economic loss. See, e.g., *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958). When personal injuries to third parties are at issue, a third party usually will not have had any information communicated to him by the architect. Thus, the misrepresentation exception appears to be limited to third parties who are involved to some extent in the construction process.

30. See Note, *supra* note 16, at 1223.

31. *Erhart v. Hummonds*, 232 Ark. 133, 137, 334 S.W.2d 869, 872 (1960). The third-party beneficiary exception, however, has limited application to architects because of the "intended benefit" requirement. Third parties related to the construction project (e.g., construction workers) may find the contracts to be intended for their benefit, but architects are careful to exclude any language indicating such an intent. The intent required to extend protection to third parties further removed from the construction process is difficult to find in the contract. In such cases the third party will rely on a negligence theory with a corresponding duty, which may be provable since privity of contract is no longer required. See *supra* text accompanying notes 24-61.

third party to recover from the breaching party, despite a lack of privity of contract, when the contract was intended to benefit that third party.³²

The early American courts strictly applied the privity requirement,³³ which was the most effective defense an architect had to third-party actions for negligence.³⁴ An architect did not have to present a defense on the merits unless the plaintiff could establish the necessary privity of contract.³⁵ The rationale of these cases was that the architect's duty to use reasonable care was based on his contract with the owner and that, therefore, this duty did not extend beyond the contracting parties.³⁶ The protection afforded architects was so effective that professional liability insurance was not considered necessary until the 1950s.³⁷ The doctrine of privity, however, is no longer an effective shield for the architect.

The demise of the privity doctrine is of fairly recent origin. The erosion began in 1916 with the landmark decision of *MacPherson v. Buick Motor Co.*,³⁸ which eliminated the privity of contract requirement in cases in which a manufacturer was sued for negligent design of a product.³⁹ The court held that a manufacturer of a negligently designed product is liable to anyone who foreseeably might use the product.⁴⁰ This foreseeability test was later applied to the construction industry.⁴¹ Then, in 1957, in *Inman v. Binghamton Housing Authority*,⁴² the foreseeability test was applied to an architect's liability for negligent design. The *Inman* case arose when a young child was injured in a fall from a porch that was designed without a railing.⁴³ The New York Court of Appeals held that the foreseeability test of *MacPherson* was applicable to architects and that privity of contract was no longer required for an injured party to recover for negligent design.⁴⁴ The court noted that "[t]he principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it . . . cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land."⁴⁵

The *Inman* decision, however, held the architect not liable for the negligent design because the danger was patent.⁴⁶ Therefore, the limited holding of *Inman* was

32. See Note, *supra* note 16, at 1223 n.11 (citing cases). For further consideration of the third-party beneficiary theory, see generally 17 AM. JUR. 2D *Contracts* §§ 302-19 (1964).

33. See, e.g., *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926), *overruled on other grounds*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956).

34. *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); see *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926) (contractor), *overruled on other grounds*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956).

35. Note, *supra* note 14, at 307. See *supra* text accompanying notes 24-25 for a definition of privity of contract.

36. See *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926) (contractor), *overruled on other grounds*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956).

37. Note, *supra* note 14, at 307 n.7 (citing cases).

38. 217 N.Y. 382, 111 N.E. 1050 (1916).

39. See *id.*

40. See *id.*

41. See *Foley v. Pittsburg-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949) (foreseeability test applied to a case dealing with the construction of improvements on real property, but the defendant was a contractor, not an architect).

42. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

43. *Id.* at 142-43, 143 N.E.2d at 897-98, 164 N.Y.S.2d at 701.

44. *Id.* at 144, 143 N.E.2d at 899, 164 N.Y.S.2d at 703-04.

45. *Id.* (quoting *Foley v. Pittsburg-Des Moines Co.*, 363 Pa. 1, 35, 68 A.2d 517, 533 (1949)).

46. *Id.* at 145-46, 143 N.E.2d at 899-900, 164 N.Y.S.2d at 704. Patent is defined as "open; manifest; evident." In this context, it means that which is plainly visible or could be discovered by an inspection with ordinary care. BLACK'S LAW DICTIONARY 1013 (5th ed. 1979).

that an architect was liable only for latent or hidden dangers resulting from his negligent design.⁴⁷ This limitation, however, was not universally adopted.⁴⁸

Subsequent decisions have been nearly unanimous in extending the architect's duty beyond the limits of the privity of contract doctrine.⁴⁹ The general rule today is that privity of contract is no longer a bar to a negligence action against an architect.⁵⁰

2. Potential Plaintiffs After the Fall of Privity

The privity doctrine prevented the extension of liability to the full limits of foreseeability.⁵¹ The decisions that have abolished the privity doctrine have adopted a foreseeability test to determine a defendant's liability to an injured party.⁵² This test must be carefully defined, however, since foreseeability carried to its extreme would result in an architect owing a duty to the entire world.⁵³

Most courts have not imposed such a universal duty,⁵⁴ but have relied on a more flexible balancing approach that avoids the rigidity of privity yet prevents unlimited exposure to liability. The California Supreme Court, in *Biakanja v. Irving*,⁵⁵ noted that some public policies favor restricting the scope of the duty owed by a professional to third parties. The court listed the following considerations: (1) The extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of the harm to the plaintiff, (3) the degree of certainty that an injury was suffered, (4) the connection between the conduct and the injury, (5) the moral blame, and (6) the policy of preventing future harm.⁵⁶

Application of these considerations to the architect would provide a realistic view of the proper extent of an architect's liability. Consideration of the extent to which the construction project is intended to affect the plaintiff would limit liability to those who are entitled to protection by virtue of being more than a secondary consideration in the architect's and owner's activities. The foreseeability of harm element would also give courts the opportunity to limit the extension of the architect's duty. Most important, consideration of the moral blame for an architect's actions would allow a determination of just how blameworthy those actions were. Finally,

47. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

48. See, e.g., *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 80-81, 207 A.2d 314, 320 (1965). The court held that knowledge by the plaintiff of a "dangerous condition [does] not, as a matter of law, preclude a finding of negligence." *Id.* at 81, 207 A.2d at 320. Thus, although a danger is patent, liability may not be precluded. See generally 2 F. HARPER & F. JAMES, TORTS § 28.5, at 1543 (1956).

49. See, e.g., *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); *Simon v. Omaha Pub. Power Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972).

50. See *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); *Simon v. Omaha Pub. Power Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). *Contra Peyronnin Constr. Co. v. Weiss*, 137 Ind. App. 417, 208 N.E.2d 489 (1965).

51. Note, *supra* note 14, at 311.

52. *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133, 134-35 (1963); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 162, 222 N.E.2d 584, 588-89 (1966).

53. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 350, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

54. Note, *supra* note 14, at 313-14.

55. 49 Cal. 2d 647, 320 P.2d 16 (1958).

56. *Id.* at 650, 320 P.2d at 19.

the deterrence element would allow consideration of how effective the imposition of liability would be in preventing future harm.⁵⁷ The overall effect of the *Biakanja* test is to provide opportunities for an explicit consideration of public policies and a balancing of those policies to determine the architect's liability. The *Biakanja* test has been followed in several cases concerning architects and engineers.⁵⁸

Subsequent cases have recommended additional considerations such as the societal impact of imposing liability on a particular party⁵⁹ and the burden that would result to the party if he were held liable.⁶⁰ Another approach is to use the *Biakanja* case-by-case analysis with the addition of considerations such as the potential for unlimited liability, the effect of liability on the profession, the relative burden of prevention, and the ability to bear the loss.⁶¹ This approach is more acceptable since it properly recognizes that the benefits architects confer on society may justify limiting the scope of their duty and, thereby, their liability.

The present trend toward balancing is a justifiable response to the inflexibility of the privity doctrine. Despite a less than full expansion of the architect's liability, however, the fall of privity has resulted in the exposure of the architect to a significantly greater number of potential plaintiffs and, therefore, to greater potential liability.

B. Owner Acceptance Rule

The abolition of the owner acceptance rule is another important force in the expansion of the architect's liability to third parties. Under the owner acceptance rule, an architect is not liable to third parties after a structure has been completed and accepted by the owner.⁶² Therefore, when this rule applies, the architect's negligence is not an issue.⁶³

One basis for the rule is that the architect does not owe a duty to third parties. In *Daugherty v. Herzog*⁶⁴ the Supreme Court of Indiana held that a contractor was not liable to third parties after the owner's acceptance because the contractor owed no duty to such third parties.⁶⁵ Thus, the owner acceptance rule often hinged on the failure of a third party to establish a duty owed by the architect, a failure often due to a lack of privity of contract. Since privity is no longer required, the issue of duty is

57. See *infra* text accompanying notes 345-47 for a discussion of the appropriateness of applying a deterrence rationale to architects.

58. See, e.g., *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976); *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967).

59. See *Kornitz v. Earling & Hiller, Inc.*, 49 Wis. 2d 97, 181 N.W.2d 403 (1970).

60. See *A. E. Inv. Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479, 214 N.W.2d 764 (1974).

61. Note, *supra* note 14, at 315-18.

62. See *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926) (contractor), *overruled*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956); *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457 (1896).

63. See *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253 (D. C. Cir. 1926) (contractor), *overruled*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956); *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457 (1896).

64. 145 Ind. 255, 44 N.E. 457 (1896).

65. *Id.* at 257, 44 N.E. at 457.

not dependent on a contractual relationship. If an injured party can establish a duty, the lack of duty rationale for the owner acceptance rule is no defense for the architect.

Other rationales, however, might support application of the owner acceptance rule. One rationale for the rule is preventing the architect from being held liable long after construction is completed.⁶⁶ This rationale is based on social and economic policy considerations that might be better served by other means.⁶⁷ Another rationale for the rule is that the proximate cause of the injury is the owner's negligence in maintaining the building, not the architect's or contractor's negligence.⁶⁸ The argument is that when the owner accepts the building, the responsibility for the condition of the premises shifts to the owner because the architect no longer has control of the structure. The architect can no longer change or correct any defects. Moreover, the owner is in a better position to discover any defects that might exist.

The owner acceptance rule, if applicable, provides a defense for architects when they are sued for injuries incurred after the owner's acceptance of the structure. Even after the fall of the privity requirement, which effectively nullified the lack of duty rationale for the rule, other rationales were still available to support the rule. The rule, however, has been abolished in most jurisdictions. The abolition was a gradual process that began with the application of exceptions to nonliability when the architect was guilty of fraud or deliberate concealment,⁶⁹ when the structure was inherently or imminently dangerous,⁷⁰ and when the structure was a nuisance.⁷¹ As noted above, the demise of the owner acceptance rule paralleled the fall of the privity requirement since the lack of duty rationale for the rule was often based on a lack of privity of contract. The justification for abolishing the owner acceptance rule is unclear. It may simply be the result of a policy determination that architects' responsibility for their work does not end with a simple shift in control of a structure. This justification appears sound since architects are responsible, in large part, for the structure: a fact that is not changed by the owner's acceptance of the structure. The result is that the owner acceptance rule has little or no impact today.⁷² Each case now turns on whether the architect owed a duty to the injured third party, a question that is generally answered under the foreseeability test.⁷³

C. Time of Discovery Rule

A statute of limitations⁷⁴ bars a plaintiff's cause of action after a specified lapse of time and is designed to provide a defending party a fair opportunity to defend

66. *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253, 254 (D.C. Cir. 1926) (contractor), *overruled*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956).

67. See *infra* text accompanying notes 86-106 (discussion of special statutes of limitations).

68. See *Hanna v. Fletcher*, 231 F.2d 469, 472-73 (D.C. Cir. 1956); *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); *Ford v. Sturgis*, 14 F.2d 253, 254 (D.C. Cir. 1926) (contractor), *overruled*, *Hanna v. Fletcher*, 231 F.2d 469, 474 (D.C. Cir. 1956); *Daugherty v. Herzog*, 145 Ind. 255, 257, 44 N.E. 457, 458 (1896).

69. *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N.W. 1012 (1910).

70. *Johnston v. Long*, 56 Cal. App. 2d 834, 133 P.2d 409 (1943).

71. *Kendrick v. Mason*, 234 La. 271, 99 So. 2d 108 (1958).

72. See, e.g., *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968).

73. See *supra* text accompanying notes 38-61.

74. "Statute of limitations" is used here to refer to both statutory and nonstatutory limitations of actions.

against the action.⁷⁵ In general, statutes of limitations for negligence actions do not begin to run until some damage or injury occurs.⁷⁶ A problem arises, however, when an injury occurs long after the negligent act. One must determine whether the statute begins to run at the time of the injury (or damage) or at the time the negligent act occurred that later caused the injury. The old rule was that the period commenced from the date of the negligent act, not from the time of the injury.⁷⁷ When this standard was applied to architects, the architect was subject to liability for only a fixed period of time. The injustice that this rule worked on a plaintiff injured after the statute of limitations had run led to the adoption of the time of discovery rule.

The time of discovery rule commences the running of the statute of limitations when the alleged wrong is discovered or should have been discovered by the plaintiff.⁷⁸ Many courts have applied the time of discovery rule to negligence actions besides those against architects, particularly when the negligence is such that an injury may be likely to occur long after the negligent act. An example of this is a medical malpractice action.⁷⁹

The injustice of commencing the period from the date of the alleged wrong and the likelihood of injuries occurring long after the architect's negligent act have led many jurisdictions to apply the time of discovery rule to architects and the construction industry.⁸⁰ The decision in *Golden Grain Macaroni Co. v. Klefstad Engineering Co.*⁸¹ limited the application of the time of discovery rule to cases in which the passage of time has not compounded the problems of proof or increased the danger of false or fraudulent claims.⁸² Although this holding appears to call for a case-by-case determination, the decision seems to imply that construction cases as a class are suited for the time of discovery rule.

The application of the time of discovery rule to an architect subjects him to potential liability to third parties for the lifetime of the building or structure.⁸³ Theoretically, an architect could be liable "throughout his professional life and into retirement."⁸⁴ This endless expansion of liability conflicts with the principle that liability should come to an end. A potential defendant should not be required to

75. W. PROSSER, *supra* note 9, § 30, at 144.

76. *See* *White v. Schnobelen*, 91 N.H. 273, 276, 18 A.2d 185, 187 (1941); W. PROSSER, *supra* note 9, § 30, at 144.

77. 54 C.J.S. *Limitations of Actions* § 168(a) (1948).

78. *Chrischilles v. Griswold*, 260 Iowa 453, 462, 150 N.W.2d 94, 100 (1967).

79. *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); *Frohs v. Greene*, 253 Or. 1, 452 P.2d 564 (1969); *Wilkinson v. Harrington*, 104 R.I. 224, 243 A.2d 745 (1968).

80. *See, e.g., Golden Grain Macaroni Co. v. Klefstad Eng'g Co.*, 45 Ill. App. 3d 77, 358 N.E.2d 1295 (1976); *Chrischilles v. Griswold*, 260 Iowa 453, 150 N.W.2d 94 (1967); *Steelworkers Holding Co. v. Menefee*, 255 Md. 440, 258 A.2d 177 (1969); *see also* W. PROSSER, *supra* note 9, § 30, at 144.

81. 45 Ill. App. 3d 77, 358 N.E.2d 1295 (1976).

82. *Id.* at 80, 358 N.E.2d at 1297. The decision also cites other negligence cases in which the time of discovery rule was applied. *See id.* at 79-80, 358 N.E.2d at 1296-97.

83. This is subject to the special statutes of limitations enacted by many states. *See infra* text accompanying notes 86-106.

84. Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. U.L. REV. 361, 363 (1969).

defend against stale claims and be forced to rely on faded memories, lost evidence, and witnesses who have died or disappeared.⁸⁵

This conflict has led to the enactment of special statutes of limitations. These special statutes are the most important weapons an architect has in combatting the expansion of liability for indefinite periods of time. They have been enacted by many states⁸⁶ as a result of pressure on state legislatures by the architectural profession and the construction industry after the expansion of liability began in the late 1950s.⁸⁷ As noted above, a tort statute of limitations normally does not begin to run until the defect is discovered,⁸⁸ but the special statutes typically commence running from the time of performance of the architect's services⁸⁹ or the time of "substantial completion" of the structure.⁹⁰ The special statutes serve to limit the length of time that an architect is subject to liability, but do not affect his duty to third parties.

While these special statutes are termed "statutes of limitations," they are not. A statute of limitations normally governs the time within which an action must be instituted after the cause of action accrues. These special statutes, however, bar any action after a certain period of time and may bar an action before the cause of action accrues.⁹¹

The special statutes attempt to balance the interests of potential plaintiffs and potential defendants. Policy considerations favoring these special statutes are (1) that design professionals should not be subject to liability in perpetuity;⁹² (2) that the passage of time prejudices the defendant in his defense;⁹³ and (3) that the question of improper maintenance by an owner becomes a possibility as the proximate cause of an injury caused by structural failures.⁹⁴ The counterconsiderations that argue against these statutes are (1) that professional liability insurance is available and its cost can be passed on to the consuming public;⁹⁵ (2) that passage of time hinders the plaintiff equally, if not more, since the plaintiff bears the burden of proof; and (3) that the plaintiff has the burden of proof to show that the defect, not improper maintenance, caused the injury.⁹⁶

The existence of these policy considerations indicates that the statutes properly should be left to a legislature's discretion. In some states, however, the courts have

85. Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

86. See, e.g., OHIO REV. CODE ANN. § 2305.131 (Page 1981). See Comment, *supra* note 13, at 92 n.130, for a list of similar statutes enacted in other states.

87. See *supra* text accompanying notes 11-13.

88. See *supra* text accompanying notes 78-83.

89. See, e.g., OHIO REV. CODE ANN. § 2305.131 (Page 1981).

90. Comment, *supra* note 13, at 92.

91. See *Skinner v. Anderson*, 38 Ill. 2d 455, 458, 231 N.E.2d 588, 590 (1967).

92. See *supra* text accompanying notes 83-85.

93. See *supra* text accompanying notes 75 & 85.

94. See *infra* text accompanying notes 395-97 (discussion of the proximate cause defense); see also Comment, *Recent Statutory Developments Concerning the Limitation of Actions Against Architects, Engineers and Builders*, 60 KY. L.J. 462, 468 (1972) (sets forth the policy considerations noted in text accompanying notes 92-94).

95. See *infra* text accompanying notes 444-48.

96. Comment, *supra* note 94, at 468.

become involved, holding several of these special statutes unconstitutional,⁹⁷ frequently on equal protection⁹⁸ or due process grounds.⁹⁹ Legislatures have made their intent to determine proper policy in this area clear; at least two state legislatures have reenacted special statutes of limitations after their state courts had held them unconstitutional.¹⁰⁰ One statute was reenacted without revision, but with a statement of legislative purpose attached.¹⁰¹

The special statutes of limitations are a pervasive¹⁰² and tenacious feature of the law concerning an architect's liability. They are the architect's most effective weapon against the perpetual liability resulting from application of the time of discovery rule.¹⁰³ These special statutes are "realistic and necessary" because of the longevity of an architect's work.¹⁰⁴ Although some would argue that the balance has swung too far in protecting the design professional, the special statutes clearly reflect the importance of the contributions that architects make to society.¹⁰⁵ While these special statutes appear to be firmly entrenched in the American legal system, they are not beyond attack, and an architect should not rely solely on them for protection.¹⁰⁶

D. Other Elements of the Expansion of Liability to Third Parties

The workers' compensation system in this country has affected the architect's current legal status, particularly his relation to construction workers.¹⁰⁷ In most states, when a worker is injured the workers' compensation program is the exclusive remedy of the worker against his employer.¹⁰⁸ Even in those jurisdictions where the program is not the exclusive remedy, an employee relinquishes his common-law right to sue his employer for an injury when the employee receives benefits from the program.¹⁰⁹ In addition, the benefits provided under these programs are usually

97. See, e.g., *Plant v. R. L. Reid, Inc.*, 294 Ala. 155, 313 So. 2d 518 (1975) (void for vagueness); *Overland Constr. Co. v. Simmons*, 369 So. 2d 572 (Fla. 1979) (denies access to the courts under the Florida Constitution); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (grants to architects and contractors a special or exclusive immunity in violation of the Illinois Constitution); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) (destroys common-law rights of action in violation of the Kentucky Constitution); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (unreasonable immunity under the Wisconsin Constitution).

98. See, e.g., *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

99. See, e.g., *Overland Constr. Co. v. Simmons*, 369 So. 2d 572 (Fla. 1979).

100. See Act of May 17, 1980, ch. 70, 1980 Hawaii Sess. Laws 94 (codified at HAWAII REV. STAT. § 657-8 (Supp. 1982)) (declared unconstitutional, despite the revised reenactment, in *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, 647 P.2d 276 (1982)); Act of July 2, 1980, 1980 Fla. Laws 1389 (codified at FLA. STAT. ANN. § 95.11(3)(c) (West 1982)).

101. Act of July 2, 1980, 1980 Fla. Laws 1389, 1390 (preamble of new statute contains a statement that the Florida Supreme Court's decision in *Overland* was contrary to "the best interest of the people of the state").

102. See Comment, *supra* note 13, at 92 n.130 (list of statutes).

103. See *supra* text accompanying notes 83-86.

104. Comment, *supra* note 13, at 93.

105. See *infra* text accompanying notes 438-39.

106. These special statutes are more extensively discussed in other legal commentaries. For more complete analyses, see Collins, *supra* note 8; Ellison, *Statutory Termination of Perpetual Liability for Design and Construction Negligence*, in GUIDELINES FOR IMPROVING PRACTICE at General Information—38 (Victor O. Schinnerer & Co. ed. 1981); Comment, *supra* note 84; Comment, *supra* note 94.

107. For a general discussion of the nature of workers' compensation laws, see 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 1.10, 2.00, 2.20, 2.30, 2.40, 2.50 (1982).

108. See, e.g., OHIO CONST. art. II, § 35; OHIO REV. CODE ANN. § 4123.74 (Page 1980).

109. See 1 A. LARSON, *supra* note 107, § 1.10.

limited to medical expenses and partial compensation for the loss or impairment of the income producing ability of the plaintiff.¹¹⁰ Workers are not compensated for losses such as pain and suffering and disfigurement, losses that are recoverable under traditional tort theories.¹¹¹ The inadequacy of the benefits under this exclusive system has led many workers to seek compensation from other sources. Although an employer is immune from suit under the workers' compensation laws, a third party such as an architect is not protected; a worker retains the common-law right to sue a third party, including an architect.¹¹²

The inadequacy of the workers' compensation system has made the architect a prime target in the injured construction worker's search for a "deep pocket." The two traditional barriers to a worker's recovery against the architect were the privity requirement and a refusal by the judiciary to extend the architect's supervisory duty to include the safety of construction methods.¹¹³ Both the privity requirement¹¹⁴ and the judiciary's position on supervisory duty¹¹⁵ have been weakened so that the architect has become subject to suits by injured workers, thus further expanding the architect's liability.

The social climate in this country also contributes to the architect's expanding liability and may be responsible for some of the policy changes indicated in the discussions above.¹¹⁶ The American people have become a litigious society; litigation seems to be the primary course of action that people seek when they are injured or damaged. In many cases the search for a "deep pocket" may include the architect.¹¹⁷ The availability of liability insurance has been both a cause and an effect of the architect's expanding liability. As many long-standing defenses began to wither, the need for insurance and its availability increased.¹¹⁸ As the availability of liability insurance increased, the architect increasingly became the target of injured persons seeking a party from whom they could recover.

The expansion of the architect's liability over the years is a product of a combination of the factors discussed above. This expansion has not been uniform; the impact of the changes on the various theories of liability differs. These theories are discussed below with particular emphasis on the negligence theory.

110. *Id.*

111. Note, *supra* note 16, at 1239.

112. See 1 A. LARSON, *supra* note 107, § 1.10.

113. Note, *supra* note 16, at 1239-40.

114. See *supra* subpart II(A).

115. See *infra* subparts III(B)-(C).

116. See Amcs, *Professional Liability: Where the Problems Lie*, CONSULTING ENGINEER, Aug. 1977, at 83 (lists such factors as the consumer movement, the social climate favoring strict liability, liberal courts, zealous plaintiff's attorneys, and the availability of liability insurance as causes of the increased number of claims against architects and builders).

117. See *infra* text accompanying notes 340-44 for a discussion of the architect's appropriateness as a "deep pocket."

118. Note, *supra* note 14, at 307.

III. THE NEGLIGENCE THEORY

When a third party sues an architect, the suit is typically a negligence action, although the plaintiff may plead several theories.¹¹⁹ It is important, therefore, to consider negligence theory and its relation to the architect's services and functions.

A. *Elements of the Negligence Theory*

At English common law an architect was held liable for personal injury only on a finding of negligence and a contractual relationship between the alleged tortfeasor and the injured party.¹²⁰ As already discussed, the privity requirement is no longer essential to establishing liability.¹²¹ To recover against an architect for negligence, the plaintiff must prove the four standard elements of negligence:¹²² (1) that the plaintiff was protected by a rule of law from the architect's conduct (duty), (2) that the architect's conduct violated this duty (breach), (3) that the injury was a result of the architect's conduct (proximate cause), and (4) that the plaintiff suffered a loss (damage).¹²³

The duty element is expressed by a standard of care that defines an architect's quantitative¹²⁴ and qualitative¹²⁵ obligations to third parties. The question of duty comprises two issues: first, the nature of the architect's duty, and second, a determination of those to whom the architect owes that duty. The courts have been nearly unanimous in adopting the view that a duty is owed to all who may foreseeably be injured by the architect's failure to fulfill a duty.¹²⁶ Foreseeability, however, is subject to interpretation and does not provide an easily applied test.¹²⁷

The general definition of the architect's duty has developed over time into a clearly stated principle. In *Bayne v. Everham*¹²⁸ the Supreme Court of Michigan held that an architect "must possess and exercise the care and skill of those ordinarily skilled in the business."¹²⁹ The court analogized that an architect, like a lawyer or physician, "has done all the law requires" "[w]hen he possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment."¹³⁰ This principle has been accepted in most jurisdictions.¹³¹

119. See *infra* part IV.

120. Note, *supra* note 16, at 1222.

121. See *supra* subpart II(A).

122. *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir. 1971); W. PROSSER, *supra* note 9, § 30, at 143.

123. See *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir. 1971).

124. The term "quantitative" is used to refer to how long and to how many a duty is owed.

125. The term "qualitative" is used to refer to the nature of the duty itself. It relates specifically to the standard of care to which an architect will be held.

126. E.g., *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

127. See *supra* subpart II(A)(2).

128. 197 Mich. 181, 163 N.W. 1002 (1917).

129. *Id.* at 199-200, 163 N.W. at 1008.

130. *Id.* at 200, 163 N.W. at 1008; see also *Chapel v. Clark*, 117 Mich. 638, 640, 76 N.W. 62, 62 (1898).

131. E.g., *Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Assocs., Inc.*, 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964); *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 166, 144 S.E.2d 450, 453 (1965); *Coombs v. Beede*, 89 Me. 187, 188, 36 A. 104, 105 (1896); *Cowles v. City of Minneapolis*, 128 Minn. 452, 453-54, 151 N.W. 184, 185 (1915); *Scott v. Potomac Ins. Co.*, 217 Or. 323, 331-32, 341 P.2d 1083, 1086-87 (1959); *Shipman v. State*, 43 Wis. 381 (1877).

The clearest definition of the architect's duty is found in *Paxton v. Alameda County*,¹³² in which a California appellate court approved the following jury instruction, which had been given by the trial court:

"By undertaking professional service to a client, an architect impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by architects of good standing, practicing in the same locality. It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning, in an effort to accomplish the purpose for which he is employed. . . . The standard is that set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in the same locality, at the same time."¹³³

The court also held that if an architect's actions are within this standard, no finding of negligence results even if mistakes were made.¹³⁴ This rule seems to be based on the view that an architect is not a warrantor of his work and is only required to meet the reasonable standard of care established by law.

The court in *Paxton* applied a standard of care based on the practices of architects in the same locality.¹³⁵ Other jurisdictions have applied a more general standard without limiting it to a certain locality.¹³⁶ The importance of this variation is unclear, but application of a strict locality standard may result in a significantly greater or lesser duty if a certain locality maintains a different quality of practice than the profession in general.¹³⁷

The standard set forth in *Paxton* clearly defines the standard of care in general terms, but to recover, a plaintiff must establish the specific standard required of the defendant architect. This is accomplished by the introduction of expert opinion evidence.¹³⁸ Expert opinion testimony is generally sufficient to raise a jury question of whether the standard of care has been met by the defendant architect.¹³⁹

Expert testimony protects an architect. It allows a reliable, objective determination of what is reasonable, rather than allowing a jury to make a subjective decision about how the architect should perform.¹⁴⁰ The requirement of expert testimony,

132. 119 Cal. App. 2d 393, 259 P.2d 934 (1953).

133. *Id.* at 398-99, 259 P.2d at 938.

134. *Id.* at 406, 259 P.2d at 942.

135. *Id.* at 399, 259 P.2d at 938; see also Davidson, *The Liability of Architects*, TRIAL, June 1977, at 20, 22.

136. See, e.g., *Seiler v. Levitz Furniture Co.*, 367 A.2d 999, 1008 (Del. 1976) (standard of "ordinary skill and ability in his profession" (emphasis added)).

137. This issue has had particular importance in medical malpractice cases. Under a "strict locality rule," a physician or surgeon can be held only to the degree of diligence, learning, and skill possessed by physicians in the particular locality of his practice. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 218 (1981). A problem arises when a certain locality has substandard medical practice. Expert witnesses will all present evidence consistent with the low standard of practice, thus perpetuating that standard. A more serious problem occurs when only a sole practitioner practices in a locality, and that practitioner alone can testify about the local standard. As the only practitioner in the locality, negligence cannot be found under a "strict locality rule" since the sole practitioner's actions are the standard itself. See *id.*

138. *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 144 S.E.2d 450 (1965). But see *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968) (holding that certain duties of an architect are within the common knowledge of ordinary people and, therefore, require no expert evidence).

139. See *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 144 S.E.2d 450 (1965); *Willner v. Woodward*, 201 Va. 104, 109 S.E.2d 132 (1959); *Hommel v. Badger State Inv. Co.*, 166 Wis. 235, 165 N.W. 20 (1917).

140. However, juries may be making these types of subjective judgments despite the use of expert testimony.

however, does present problems. Professionals who furnish skilled services should have wide discretion in determining what practices and principles are best suited for the work they do.¹⁴¹ In the architectural profession answers often are not "right" or "wrong." Instead, the architect must make judgments based on his opinion under the circumstances.¹⁴² Because of this subjective element, it is often difficult to say what the "ordinary and reasonable" standard is. This difficulty may lead an expert witness to offer something other than a standard within the profession.

When an individual undertakes to testify about the limits of acceptable and reasonable design standards, he must be fully acquainted with the relevant practices employed by a broad range of his fellow professionals.¹⁴³ Even if an architect has such knowledge, he must be careful to consider all the facts and circumstances weighed by the architect in question before he can fairly render an expert opinion about whether the architect has met the professional standard.¹⁴⁴ When applying a community standard, an expert witness must take care not to become a self-proclaimed authority on community standards based solely on his own practices in that community, but must know the standards of conduct of other architects in the community.¹⁴⁵ The key to expert witnesses, then, is that they express an informed opinion on the standard of the profession, not their personal standard.

The professional standard of care may not be the sole test applied. In some instances an architect may be held to a higher standard under a theory of strict liability, warranty, or negligence per se. The role of each of these theories in an architect's liability will be discussed later.¹⁴⁶

Although a general standard of care applicable to architects clearly exists, its application and effect depends on the context in which it is to be applied. Therefore, the architect's services and functions must be examined in determining his duty. The two most prominent and important services and functions are (1) preparing plans and specifications, and (2) supervising construction, both of which are examined below.

B. Preparation of Plans and Specifications

The architect's preparation of plans and specifications, the design function, is the most basic of the architect's services. Traditionally, the architect is viewed as a designer of buildings. The preparation of plans and specifications is an integral part of the architect's function and may give rise to legal problems for the architect.¹⁴⁷

The design function is not a simple process. *Broyles v. Brown Engineering Co.*¹⁴⁸ described an architect's duties as follows:

141. *Peerless Ins. Co. v. Cerny & Assocs.*, 199 F. Supp. 951, 953 (D. Minn. 1961).

142. Anderson, *Duties of an Expert Witness*, in GUIDELINES FOR IMPROVING PRACTICE at General Information—2 (Victor O. Schinnerer & Co. ed. 1971).

143. *Id.*

144. *Id.*

145. *Id.* at General Information—2(2).

146. See *infra* subparts IV(A)-(C).

147. See Note, *supra* note 16, at 1229 n.49, for a list of 24 services performed by design professionals, each of which could be the basis for allegations of negligence.

148. 275 Ala. 35, 151 So. 2d 767 (1963).

Architects must have as a part of their competency a keen aesthetic sense to enable them to design structures of beauty and dignity; they must have a technical knowledge of many structural factors which lend strength and stability to their designs. The materials they recommend for use are produced by agencies beyond the control and influence of the architect. His work is to a certain degree experimental or depends on the experiments and on production of materials by others. Then, too, the law of physics, gravity and the rotation of the earth, must, in many projects, be taken into account.¹⁴⁹

The architect is charged with designing a structure that is structurally sound, practical, and aesthetically pleasing. The architect must first create a design that satisfies the above criteria and then must communicate this design to others through drawings, sketches, plans, models, and specifications.¹⁵⁰ An architect must satisfy many design requirements; he also must satisfy legal requirements relating to his design function.

The general definition of the architect's duty to provide a safe design was established in *Paxton v. Alameda County*.¹⁵¹ According to *Paxton*, an architect may be held liable if he fails to exercise due care in the preparation of plans.¹⁵² Recent decisions show an increasing willingness of courts and juries to find that architects have breached this duty, and the result has been an expanding liability of architects to third parties.¹⁵³

Paxton arose when a construction worker was injured in a fall from the roof of a building designed by the defendant architect.¹⁵⁴ The court held that the architect was not negligent and had used reasonable care, even though the design departed from the customary practice.¹⁵⁵ The *Paxton* court apparently could have found the architect negligent, and the reluctance to so find might be evidence of a preference for architects.

In many other cases, however, architects have been held liable for breaching the professional standard of care.¹⁵⁶ For example, in *Montijo v. Swift*¹⁵⁷ an action was brought against an architect for the negligent design of a stairway at a bus depot. The plaintiff, who had fallen and been injured while descending the stairs, alleged that the architect was negligent in designing a stairway on which the handrails did not extend to the bottom of the steps, thereby creating a false illusion that the bottom of the stairs had been reached.¹⁵⁸ The court found that whether the architect had breached his duty to exercise ordinary care was a question of fact to be determined upon remand at trial.¹⁵⁹ In *Mai Kai, Inc. v. Colucci*¹⁶⁰ an architect was held liable to a restaurant

149. *Id.* at 39, 151 So. 2d at 771.

150. Note, *supra* note 16, at 1230-31 contains a description of the architect's design function.

151. 119 Cal. App. 2d 393, 259 P.2d 934 (1953). See *supra* text accompanying note 133 for a statement of this standard.

152. 119 Cal. App. 2d 393, 398-99, 259 P.2d 934, 938 (1953).

153. See *infra* text accompanying notes 157-63 & 188.

154. 119 Cal. App. 2d 393, 397, 259 P.2d 934, 937 (1953).

155. *Id.* at 406, 259 P.2d at 942.

156. See, e.g., *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Mai Kai, Inc. v. Colucci*, 186 So. 2d 798 (Fla. Dist. Ct. App. 1966); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

157. 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963).

158. *Id.* at 351-52, 33 Cal. Rptr. at 134.

159. *Id.* at 353, 33 Cal. Rptr. at 135.

160. 186 So. 2d 798 (Fla. Dist. Ct. App. 1966).

patron who was injured because of the architect's negligent design of a counterweight supporting an exhaust fan. The lengthening of the counterweight had caused increased strain on a defective weld, and the architect was held liable even though he was not responsible for the defective weld.¹⁶¹ An architect was again held liable for his design in *Laukkanen v. Jewel Tea Co.*¹⁶² The architect had designed a hollow concrete block pylon that fell on the plaintiff during a severe storm, and the finding of negligence was based on the designer's failure to use a heavy-weight concrete block with a greater wind safety factor.¹⁶³

As these cases indicate, an architect will be held negligent in his design function if the court or jury finds that he has failed to satisfy an established standard of care.¹⁶⁴ One must remember, however, that the burden of proof is on the plaintiff and this burden is not automatically satisfied by an allegation of negligence.

The four basic elements of negligence¹⁶⁵ are applicable to an architect's preparation of plans and specifications, but a more simplified statement of the plaintiff's burden has evolved in claims of negligent design. The plaintiff must essentially establish that "the architect failed to exercise the degree of skill and care required by the standards of his profession in the preparation of the plans and specifications, . . . the plans and specifications were substantially followed by the contractor, and . . . the defect in the plans was the proximate cause of [the] plaintiff's injury."¹⁶⁶

The first element relates directly to the prior discussion of the architect's duty.¹⁶⁷ The plaintiff must establish the standard of care and the accompanying duty, and then must establish the failure of the architect to satisfy that standard. Absent a breach of this standard of care no recovery is possible.

The second element is similar to the proximate cause issue, but is just the first step in the process of determining whether a causal connection exists.¹⁶⁸ If a plan is defective, but the contractor does not follow it, the architect should not be liable for injuries to third parties because causation is lacking. In *Bayne v. Everham*¹⁶⁹ the Supreme Court of Michigan held that the plaintiff must prove that a building was actually or substantially built according to the defective design to establish the liability of the architect to the third party based on defective plans.¹⁷⁰

161. *Id.* at 799.

162. 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

163. *See id.* at 163, 222 N.E.2d at 589.

164. *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Mai Kai, Inc. v. Colucci*, 186 So. 2d 798 (Fla. Dist. Ct. App. 1966); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

165. *See supra* notes 122-23 and accompanying text.

166. *Crisham, Liability of Architects and Engineers to Third Parties*, 26 FED'N INS. COUNS. Q. 177, 184 (1976).

167. *See supra* text accompanying notes 124-39.

168. While an injured third party may be able to show that the architect breached his duty by failing to satisfy the applicable standard of care and that the plans were followed by the contractor, this showing would not absolutely determine the proximate cause relationship. Such evidence may establish a connection and possibly a causal connection, but it does not necessarily establish proximate cause.

169. 197 Mich. 181, 163 N.W. 1002 (1917).

170. *Id.* at 197, 163 N.W. at 1007; *Allen, supra* note 1, at 458.

Despite this clear holding, a plaintiff may still maintain a negligence action when the plans were not followed if he can show that the plans were ambiguous.¹⁷¹ In *Covil v. Robert & Co. Associates*¹⁷² a Georgia appellate court upheld a finding of negligence because ambiguity in the architect's plans resulted in a deviation from the plans by the contractor. The court held that "[e]ven if the contractor's interpretation . . . constituted negligence of the contractor . . . this would not absolve [the architect], for [the architect] must be held to have anticipated the interpretation."¹⁷³ One must remember, however, that an architect may be absolved of liability if a substantial variance was made by the contractor that alone caused the injury.¹⁷⁴ In some instances, the contractor's deviation may be so great that, despite ambiguous plans, the architect could not be "held to have anticipated the interpretation."¹⁷⁵

Last, to establish the architect's liability for negligent preparation of plans, the plaintiff must prove that the defect in the plans was the proximate cause of the injury. In *Day v. National U.S. Radiator Corp.*¹⁷⁶ the Supreme Court of Louisiana denied recovery to a plaintiff whose husband was killed by an explosion of a boiler.¹⁷⁷ Although the court implied that the architect may have been negligent in his design, it denied recovery because the design was not followed and, therefore, was not the proximate cause of the injury.¹⁷⁸

The proximate cause element is closely related to several common defenses or answers made by architects when charged with negligent design.¹⁷⁹ One defense is that the owner or contractor has approved the plans and, therefore, liability attaches solely to the owner or contractor.¹⁸⁰ This attempt to establish that another person assumed responsibility has been largely ineffective.¹⁸¹ Approval of plans does not ordinarily excuse the architect from liability for exercising less than ordinary and reasonable care in the preparation of those plans.¹⁸² Similarly, the defense that a contractor negligently failed to discover a defect in the plans has not been effective to

171. *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 144 S.E.2d 450 (1965).

172. *Id.*

173. *Id.* at 168, 144 S.E.2d at 454.

174. *Allen, supra* note 1, at 458.

175. *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 168, 144 S.E.2d 450, 454 (1965).

176. 241 La. 288, 128 So. 2d 660 (1961).

177. *Id.*

178. *See id.* at 309, 128 So. 2d at 668.

179. *See infra* text accompanying notes 395-97 (discussion of proximate cause as a defense to negligence actions).

180. *See Simpson Bros. Corp. v. Merrimac Chem. Co.*, 248 Mass. 346, 349, 142 N.E. 922, 922-23 (1924); *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 362, 164 A.2d 201, 203 (1960).

181. *See, e.g., Simpson Bros. Corp. v. Merrimac Chem. Co.*, 248 Mass. 346, 349, 142 N.E. 922, 922-23 (1924); *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 362, 164 A.2d 201, 203 (1960).

182. *Simpson Bros. Corp. v. Merrimac Chem. Co.*, 248 Mass. 346, 349, 142 N.E. 922, 922-23 (1924); *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 362, 164 A.2d 201, 203 (1960). The decision in *Bloomsburg Mills* clearly demonstrates that an architect cannot avoid liability by seeking the approval of another and that the architect's duty is one not easily delegated.

absolve the architect of liability for defective plans.¹⁸³ This rule also applies when the architect attempts to base his defense on a city building inspector's negligent approval of a design.¹⁸⁴

Another common defense is for the architect to claim that the negligence was committed by an independent contractor to whom the architect had delegated the preparation of plans. This also has found little support as a defense.¹⁸⁵ An architect is under a duty to provide for the safety of others and is "subject to liability to [those] for whose protection the duty is imposed."¹⁸⁶ If the harm is caused by the failure of care of an independent contractor who is employed by the architect to provide these safeguards, the architect is still liable.¹⁸⁷

The duty of an architect to exercise ordinary and reasonable care in the preparation of plans and specifications is strict and is not easily dismissed. Although the architect's liability is tempered by a heavy burden of proof on the plaintiff, the architect is still subject to extensive liability relating to the preparation of plans and specifications. In most cases in which a third party is injured because of a defect in plans or specifications, "no haven where an architect . . . may safely take cover" exists.¹⁸⁸

C. Supervision of Construction

The architect's duty in preparing plans and specifications is fairly well established, but the architect's duty of supervision is the subject of a great deal of controversy. Courts differ about what is or should be included in the architect's duty to supervise.¹⁸⁹ The architect's duty to supervise encompasses two distinct areas: (1) supervision to prevent deviations from the plans and specifications,¹⁹⁰ and (2) supervision of construction methods and techniques.¹⁹¹ The duty of the architect in each of these areas will be discussed to determine when the duty may arise.

Determining an architect's duty to supervise is significantly more difficult than determining the duty to use reasonable care in preparing plans and specifications. The

183. *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 168, 144 S.E.2d 450, 454 (1965); *Chiaverini v. Vail*, 61 R.I. 117, 119, 200 A. 462, 463 (1938).

184. *Johnson v. Salem Title Co.*, 246 Or. 409, 411-12, 425 P.2d 519, 521 (1967).

185. *Id.* at 409, 425 P.2d at 519. The holding in *Johnson* was based on a finding that the architect had a nondelegable duty to the injured party and, therefore, was liable for the negligence of the independent contractor in not complying with a building code requirement. *Id.* at 413-14, 425 P.2d at 522. When the court does not find a nondelegable duty, however, the architect's liability will depend on whether the other party is an independent contractor or an agent of the architect. The general rule is that the employer of an independent contractor is not liable for the contractor's negligence. *Winniford v. MacLeod*, 68 Or. 301, 136 P. 25 (1913); W. PROSSER, *supra* note 9, § 71, at 468. An employer is generally liable, however, for his agent's negligence. *See generally American S. Ins. Co. v. Dime Taxi Serv.*, 275 Ala. 51, 151 So. 2d 783 (1963).

186. *Johnson v. Salem Title Co.*, 246 Or. 409, 413-14, 425 P.2d 519, 522 (1967); *see Allen, The Plight of the Design Professional Today*, in GUIDELINES FOR IMPROVING PRACTICE at General Information—9 (Victor O. Schinnerer & Co. ed. 1972). *But see supra* note 185.

187. *Allen, supra* note 186, at General Information—9(2).

188. *Id.* at General Information—9(1).

189. *See infra* text accompanying notes 194-202, 263-89.

190. *See infra* subpart III(C)(1).

191. *See infra* subpart III(C)(2).

courts must closely examine the relationships and transactions between the architect, owner, and contractor to determine the allocation of the supervisory responsibilities. Absent a contractual duty to supervise, the architect is generally not required to be present during the construction phase.¹⁹² Occasionally an architect will desire limited supervisory duties, but, as noted by one commentator, "an owner generally wants to be sure that his building is put up as designed and who [is] better to see that this is done than the designer, to wit, the architect."¹⁹³

Architects' views of their role in the construction process vary. The architects who favor an active role contend that the most complete set of construction drawings "can never express the entire design concept."¹⁹⁴ These architects believe that without an active role in the construction process, "the design concepts will not be executed."¹⁹⁵ This activist school of thought is based on the traditional role of the architect as the provider of complete services to the client, including complete supervision during the construction phase.¹⁹⁶ The traditional role came into existence at a time when buildings were relatively uncomplicated and the architect was in effect both the designer and the superintendent of construction.¹⁹⁷ In some cases the architect was also the contractor.¹⁹⁸ As a result of this tradition, many owners assume that the architect will provide complete supervision.¹⁹⁹

At the other extreme are architects who favor a passive role. As structures have become more complicated and designs more technically demanding, the design professional has become less concerned with the day-to-day operations of construction.²⁰⁰ Therefore, the proponents of a passive role for architects claim that they "are not skilled at construction administration and supervision,"²⁰¹ and further, that if they become too heavily involved in the construction process they may be held "responsible for everything that goes wrong."²⁰² From the discussion to follow it appears that these fears are well founded.

The standard of care applicable to an architect's supervision is generally that care ordinarily required of "a professional skilled architect under the same or similar circumstances in carrying out his technical duties in relation to the services un-

192. See *Duggan v. Arnold N. May Builders, Inc.*, 33 Wis. 2d 49, 53, 146 N.W.2d 410, 412 (1966).

193. Goodin, *Architects and Malpractice*, 34 INS. COUNS. J. 290, 292 (1967).

194. J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 122 (1970).

195. *Id.*

196. See, e.g., *Schreiner v. Miller*, 67 Iowa 91, 24 N.W. 738 (1885); *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070, 28 So. 217 (1900). These cases indicate the extensive role that the architect historically played in the construction process.

197. See *Schreiner v. Miller*, 67 Iowa 91, 24 N.W. 738 (1885).

198. See *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070, 28 So. 217 (1900).

199. See J. SWEET, *supra* note 194, at 122.

200. Note, *supra* note 16, at 1237.

201. J. SWEET, *supra* note 194, at 122.

202. Note, *Supervisory Duties of an Architect*, 3 MEM. ST. U.L. REV. 139, 139 (1972); see J. SWEET, *supra* note 194, at 122.

dertaken by his agreement.”²⁰³ This standard is accepted by most jurisdictions²⁰⁴ and applies whenever a duty of supervision exists.²⁰⁵ Establishing the existence of that duty is the vital inquiry.

The employment of an architect is generally a matter of contract and the terms of employment are governed by the terms of the contract. Therefore, the courts must closely examine the contractual relationship between the architect and the owner to determine what supervisory duties exist before they can determine if the architect has been negligent in discharging those duties.

1. *Supervision to Assure Substantial Conformity with the Plans and Specifications*

The least controversial supervisory duty is the duty to assure that the building or structure is constructed substantially according to the architectural plans. Whether an architect supports a passive or active role in supervision of the construction process, it is clear that in most jurisdictions “the architect does owe some duty . . . to see that the building ends up built substantially according to the plans and specifications.”²⁰⁶ Any deviation from the plans by the contractor may be evidence that the architect was negligent in his duty to supervise for substantial conformity.²⁰⁷

The importance of this supervisory duty is clear from the cases that set forth this duty. One of the earliest cases dealing with the architect’s duty to see that a building is constructed according to the plans was *Schreiner v. Miller*.²⁰⁸ In that case, the Supreme Court of Iowa found that an architect had a duty to assure substantial conformity.²⁰⁹ The court also held the architect to a duty to use reasonable care in construction methods, but this was at a time when the architect was regarded as the sole superintendent of the project.²¹⁰

The leading case on the nature of the architect’s responsibility to supervise construction is *Clinton v. Boehm*.²¹¹ In *Clinton*, a New York Appellate Division Court held that the “very utmost obligation” assumed by the architect was “to see that the building was properly constructed” and, generally, to see that the owner received the building for which he contracted.²¹²

203. *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 477 (8th Cir. 1968).

204. *See, e.g.*, *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968); *Peerless Ins. Co. v. Cerny & Assocs.*, 199 F. Supp. 951 (D. Minn. 1961); *Covil v. Robert & Co. Assocs.*, 112 Ga. App. 163, 144 S.E.2d 450 (1965); *Coombs v. Beede*, 89 Me. 187, 36 A. 104 (1896); *Chapel v. Clark*, 117 Mich. 638, 76 N.W. 62 (1898); *Cowles v. City of Minneapolis*, 128 Minn. 452, 151 N.W. 184 (1915); *Scott v. Potomac Ins. Co.*, 217 Or. 323, 341 P.2d 1083 (1959); *Willner v. Woodward*, 201 Va. 104, 109 S.E.2d 132 (1959).

205. *See, e.g.*, *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 477 (8th Cir. 1968).

206. *Goodin*, *supra* note 193, at 292; *see Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 474 (8th Cir. 1968); *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958); *Dysart-Cook Mule Co. v. Reed & Heckenlively*, 114 Mo. App. 296, 299, 89 S.W. 591, 592-93 (1905); *Clemens v. Benzinger*, 211 A.D. 586, 590, 207 N.Y.S. 539, 543 (1925).

207. *See Johnson v. O'Neill*, 172 Mich. 334, 339, 137 N.W. 713, 715-16 (1912).

208. 67 Iowa 91, 24 N.W. 738 (1885).

209. *Id.*

210. *Id.* at 92-93, 24 N.W. at 738; *see supra* text accompanying notes 196-98.

211. 139 A.D. 73, 124 N.Y.S. 789 (1910).

212. *Id.* at 75, 124 N.Y.S. at 792; *see also Olsen v. Chase Manhattan Bank*, 10 A.D.2d 539, 205 N.Y.S.2d 60 (1960), *aff'd mem.*, 9 N.Y.2d 829, 175 N.E.2d 350, 215 N.Y.S.2d 773 (1961).

One unsettled issue is whether the architect must have notice of the contractor's deviation to be held liable for negligent supervision. In *Paxton v. Alameda County*²¹³ a California appellate court held that an architect was under a duty to supervise with reasonable care when he was put on notice that the contractor had deviated or was about to deviate from the architect's plans.²¹⁴ The court found that the architect was under a duty in these circumstances to make certain that the situation was corrected.²¹⁵ In *Lotholz v. Fiedler*,²¹⁶ however, an Illinois appellate court held that an architect should have prevented a variance from the plans, even though he had no knowledge of the deviation, which was impossible for him to see.²¹⁷ In this case the lack of a notice requirement made the duty to supervise for conformity an extremely difficult standard to satisfy. Nevertheless, the tendency is apparently to find liability despite a lack of notice.²¹⁸

Many cases have established that an architect has a duty to ensure a building's conformity with its design. Some jurisdictions have held that architects have too much authority over contractors and job progress to be immune from liability.²¹⁹ Others have based the duty on the novel features involved in a design.²²⁰ In *Bayuk v. Edson*²²¹ a California appellate court found that the contract between the architect and owner did not include supervision.²²² The court held, however, that the "novel and untried features . . . required close supervision."²²³ The court apparently implied a duty based on the importance of supervision in assuring that an owner receives the building for which he contracts.

The recognition by the courts of a supervisory duty to prevent deviations from the plans and specifications is supported by the architectural profession itself. The terms in form contracts frequently used by architects, such as the American Institute of Architects' *Standard Form of Agreement Between Owner and Architect*,²²⁴ show that architects recognize the duty to supervise for building conformity. According to these forms, "The Architect shall visit the site at intervals appropriate to the stage of construction . . . to become generally familiar with the progress and quality of Work and to determine in general if Work is proceeding in accordance with the Contract Documents."²²⁵ Clearly, then, the architectural profession recognizes a duty to supervise to prevent deviations from designs, but even this has not settled the issue.

Architects would like to limit liability for failure to conform to this supervisory duty to cases in which they are at least aware or on notice of the deviation and the

213. 119 Cal. App. 2d 393, 259 P.2d 934 (1953).

214. *Id.* at 410, 259 P.2d at 944-45.

215. *Id.*

216. 59 Ill. App. 379 (1895).

217. *Id.* at 380-81.

218. See *infra* notes 226-29 and accompanying text.

219. Allen, *supra* note 1, at 460.

220. See, e.g., *Bayuk v. Edson*, 236 Cal. App. 2d 309, 316, 46 Cal. Rptr. 49, 54 (1965).

221. 236 Cal. App. 2d 309, 46 Cal. Rptr. 49 (1965).

222. *Id.* at 312, 46 Cal. Rptr. at 51.

223. *Id.* at 316, 46 Cal. Rptr. at 54; see also Note, *supra* note 202, at 141.

224. AIA Document B141/CM, *supra* note 26.

225. *Id.* § 1.5.4.

dangers it presents.²²⁶ As noted earlier, however, *Lotholz v. Fiedler*²²⁷ held an architect liable for a variance from the plans even though it was impossible for the architect to see it.²²⁸ Subsequently, another court held that an engineer should have been aware of a deviation from his design, even though he had no notice of the variance.²²⁹ Architects have attempted through disclaimers²³⁰ to limit liability for these unknown deviations, but the effectiveness of the disclaimers is left to the ultimate determination of the courts. Given the trend toward findings of negligence, the disclaimers may not be very effective.²³¹

Although the details of the duty to supervise to assure substantial conformity with the plans are the subject of litigation, the existence of the duty is generally recognized,²³² and the negligence standard of care is applied to determine whether the architect was negligent in carrying out his supervisory duty.²³³ The duty to supervise construction methods and techniques, however, presents a more difficult issue.

2. Supervision of Construction Methods and Techniques

The greatest growth in claims by third parties against architects has been based on contracts between the architect and the owner that require the architect to supervise construction.²³⁴ This area is also subject to the most controversy. Controversial issues are whether an architect should have a duty to supervise construction methods and techniques and when the duty should apply.

The aspect of this duty applicable to third parties arises primarily from physical injury caused by faulty construction or improper construction methods. Construction workers comprise a large part of the claiming third parties, and the predominant issue is the duty to supervise for site safety. The two relevant inquiries are, first, whether the architect has undertaken to supervise the construction and, second, what the promise to supervise entails.

a. Early Cases

*Lottman v. Barnett*²³⁵ is an early case that held an architect liable for improper supervision of construction methods. In that case, the architect approved the use of a jackscrew in an unsafe manner and was held liable for advising the use of an improper

226. Note, *supra* note 7, at 250.

227. 59 Ill. App. 379 (1895).

228. *Id.* at 380-81; see *supra* text accompanying notes 216-17.

229. *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159, 167 (D.R.I. 1959).

230. AIA Document B141/CM, *supra* note 26, § 1.5.5.

231. See *Miller v. DeWitt*, 37 Ill. 2d 273, 293, 226 N.E.2d 630, 642-43 (1967) (House, J., dissenting). The architect disclaimed any guarantees of performance by the contractor, and the contract explicitly provided that the contractor was responsible for the safety of employees. *Id.* at 280-81, 226 N.E.2d at 635-36. The court found a duty of supervision despite the disclaimers.

232. See *supra* notes 206-07 and accompanying text.

233. See *supra* text accompanying notes 128-37, 203-05 (discussion of the negligence standard of care).

234. *Crisham*, *supra* note 166, at 184.

235. 62 Mo. 159 (1876).

construction technique.²³⁶ Liability was based on a theory of misfeasance²³⁷ rather than breach of a duty to supervise construction methods. Thus, *Lottman* established the proposition that when an architect engages in positive acts of misfeasance that endanger a third party, a duty of care arises to the injured party.²³⁸

Another area in which a duty of care relating to construction methods arises to third parties is when an architect has prior knowledge of a hazardous condition that eventually causes personal injury to a third party.²³⁹ In *Swarthout v. Beard*²⁴⁰ an action was brought against an architect for the wrongful death of a contractor's employee resulting from a cave-in of an excavation.²⁴¹ The court held that since the architect had knowledge of the dangerous condition, his failure to act could constitute negligence.²⁴²

Lottman and *Swarthout* were not typical cases of negligent supervision of construction methods. These cases did not impose a duty to supervise construction methods, but were based on misfeasance (*Lottman*) and on a failure to act despite notice of a dangerous condition (*Swarthout*). Thus, these cases are distinguishable from cases in which the architect is held to have a duty to ensure that no dangerous condition arises.

The contract between architect and owner, which typically sets forth the responsibilities of each of the parties,²⁴³ is vital in determining the architect's duty to supervise construction methods since it is generally recognized that the architect has no duty of supervision unless he assumes it in some manner.²⁴⁴ Many cases in which third parties (including construction workers) have brought successful suits against architects have based liability on "provisions in the professional service contract with the client or the general conditions in the construction contract (or both)."²⁴⁵

236. *Id.*

237. Misfeasance is defined as "[t]he improper performance of some act which a man may lawfully do." BLACK'S LAW DICTIONARY 902 (5th ed. 1979). In the architectural context, misfeasance denotes an architect's improper act (e.g., directing the use of an unsafe construction method), rather than a negligent failure to prevent the use of the unsafe methods.

238. See *Day v. National U.S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961); *Olsen v. Chase Manhattan Bank*, 10 A.D.2d 539, 205 N.Y.S.2d 60 (1960), *aff'd mem.*, 9 N.Y.2d 829, 175 N.E.2d 350, 215 N.Y.S.2d 773 (1961); *Clemens v. Benzinger*, 211 A.D. 586, 207 N.Y.S. 539 (1925).

239. See *Erhart v. Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960); *Swarthout v. Beard*, 33 Mich. App. 395, 190 N.W.2d 373 (1971); see also *Potter v. Gilbert*, 130 A.D. 632, 634, 115 N.Y.S. 425, 427, *aff'd mem.*, 196 N.Y. 576, 90 N.E. 1165 (1909).

240. 33 Mich. App. 395, 190 N.W.2d 373 (1971).

241. *Id.* at 398-99, 190 N.W.2d at 374.

242. *Id.* at 402-03, 190 N.W.2d at 376.

243. See generally the American Institute of Architects' Documents reprinted in J. LAMBERT & L. WHITE, HANDBOOK OF MODERN CONSTRUCTION LAW at 231-347 (1982).

244. See, e.g., *Duggan v. Arnold N. May Builders, Inc.*, 33 Wis. 2d 49, 53, 146 N.W.2d 410, 412 (1966).

245. *Types of Professional Liability Claims*, in GUIDELINES FOR IMPROVING PRACTICE at Special Studies—5,—5(1) (Victor O. Schinnerer & Co. ed. 1979); see *Clinton v. Boehm*, 139 A.D. 73, 124 N.Y.S. 789 (1910). *Clinton* was an early case setting forth the architect's duty to supervise construction methods and techniques. The court examined the relationship between the architect, owner, and contractor to determine whether or not the architect had assumed the duty to supervise construction methods. *Id.* The court held that the architect had not assumed a duty to supervise the methods of construction and, therefore, was not liable. *Id.* This case indicates the analysis of the contractual relationships that courts undertake when considering the duty of supervision.

The trend for courts to find that an architect has a duty to supervise construction methods began with the view that architects have too much authority to be immune from liability.²⁴⁶ *Pancoast v. Russell*²⁴⁷ is an early case that held an architect to a duty to supervise construction methods. The opinion, by a California appellate court, reflects the activist school of thought.²⁴⁸ The court held that "the term 'general supervision,' as used in the instant agreement, must mean something other than mere superficial supervision. Obviously, there can be no real value in supervision unless the same be directed towards securing a workmanlike adherence to specifications and adequate performance on the part of the contractor."²⁴⁹ In *Pancoast* the action was by a homeowner against the architect for negligent performance of the duty to inspect and approve the contractor's work.²⁵⁰ The opinion clearly demonstrates the view that the architect's contractual obligation of "general supervision" means significantly more than supervision for conformity with the design. Thus, this case marks the beginning of the liberal expansion of the architect's duty.

Although the duty of supervision generally had been limited to assuring conformity with plans and specifications,²⁵¹ many jurisdictions began to adopt expansive views of the architect's duty.²⁵² In *Pastorelli v. Associated Engineers, Inc.*,²⁵³ which dealt with the duty of supervising engineers, a federal district court held that an architect or engineer who has general supervision and control of construction must exercise reasonable care to see that the contractors do their work properly.²⁵⁴ The application of a negligence standard indicates that the court implied a duty to supervise construction methods. This principle was made explicit in *Erhart v. Hummonds*,²⁵⁵ an action against architects for the deaths of workmen who were killed when the wall of an excavation caved in.²⁵⁶ The Supreme Court of Arkansas expressly held that the architects had a duty to supervise construction methods.²⁵⁷ The duty, reasoned the court, arose from the general supervisory responsibilities of architects coupled with the architect's contractual authority to stop work to ensure "'proper execution of the contract.'"²⁵⁸ This theme is common among early cases finding a duty to supervise construction methods.²⁵⁹

246. Allen, *supra* note 1, at 460.

247. 148 Cal. App. 2d 909, 307 P.2d 719 (1957).

248. See *supra* text accompanying notes 194-99 (discussion of the "active" architectural role).

249. 148 Cal. App. 2d 909, 913, 307 P.2d 719, 722-23 (1957).

250. *Id.* at 910-11, 307 P.2d at 721.

251. See *Day v. National U.S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961); *Wells v. Stanley J. Thill & Assocs.*, 153 Mont. 28, 452 P.2d 1015 (1969); *Olsen v. Chase Manhattan Bank*, 10 A.D.2d 539, 205 N.Y.S.2d 60 (1960), *aff'd mem.*, 9 N.Y.2d 829, 175 N.E.2d 350, 215 N.Y.S.2d 773 (1961).

252. See *Associated Eng'rs, Inc. v. Job*, 370 F.2d 633 (8th Cir.), *cert. denied*, 387 U.S. 907 (1966); *Fidelity & Casualty Co. v. J. A. Jones Constr. Co.*, 325 F.2d 605 (8th Cir. 1963); *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159 (D.R.I. 1959) (supervising engineer); *Erhart v. Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960); *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965); *Nauman v. Harold K. Beecher & Assocs.*, 19 Utah 2d 101, 426 P.2d 621 (1967).

253. 176 F. Supp. 159 (D.R.I. 1959).

254. *Id.* at 166.

255. 232 Ark. 133, 334 S.W.2d 869 (1960). *Contra Day v. National U.S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961).

256. 232 Ark. 133, 135-36, 334 S.W.2d 869, 871 (1960).

257. *Id.* at 138, 334 S.W.2d at 872.

258. *Id.*

259. See *supra* note 252.

While *Erhart* established the existence of a duty to supervise construction methods, *Day v. National U.S. Radiator Corp.*²⁶⁰ limited the architect's duty to that of reasonably ensuring conformity with the plans and specifications. In *Erhart* the architect had an express right to stop work to assure proper execution of the contract.²⁶¹ In *Day*, however, the contract gave the architect no express authority to stop work, although this authority could have been implied from the architect's responsibility to assure conformity with the design.²⁶² Thus, the presence of a contractual right to stop work played an important role in the expansion of the supervisory duty.

b. *The Miller Doctrine*

The right to stop work also played a key role in *Miller v. DeWitt*.²⁶³ *Miller* was a landmark decision and the culmination of the cases establishing the duty to supervise construction methods.²⁶⁴ In *Miller* a contractor's employees, who had been injured when the roof on a building they were renovating collapsed,²⁶⁵ alleged that the architect's failure to prevent the contractor from improperly shoring the roof constituted negligence.²⁶⁶ The Supreme Court of Illinois held that the architect had a duty to supervise construction methods and techniques, basing the existence of this duty on the contract between the architect and the owner.²⁶⁷

The contract provided that the architect's duties included "'general supervision and direction of the work,'" and the contract gave the architect "'authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract.'"²⁶⁸ The contract provided that the contractor was responsible for site safety²⁶⁹ and that the architect did not guarantee the work of the contractor.²⁷⁰ The court noted that generally the duty of an architect to supervise merely creates a duty to see that the building meets the plans and specifications,²⁷¹ but imposed a greater duty, one that was not expressly part of the contract between the owner and architect. The court considered both the owner-architect and owner-contractor agreements, and interpreted the sum of the agreements to impose on the architect the duty to interfere or even stop work if the contractor began to act in an unsafe manner or to use a hazardous method in violation of the contractor's agreement with the owner.²⁷² Thus,

260. 241 La. 288, 128 So. 2d 660 (1961). In *Day* a workman sued the architect for injuries sustained when a boiler exploded during installation and testing in the building designed by the architect. The court held that supervision of installation and testing methods was outside the architect's realm of authority. See also *Olsen v. Chase Manhattan Bank*, 10 A.D.2d 539, 205 N.Y.S.2d 60 (1960), *aff'd mem.*, 9 N.Y.2d 829, 175 N.E.2d 350, 215 N.Y.S.2d 773 (1961).

261. 232 Ark. 133, 138, 334 S.W.2d 869, 872 (1960).

262. See 241 La. 288, 303-05, 128 So. 2d 660, 666-67 (1961).

263. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

264. See *supra* text accompanying notes 252-62.

265. 37 Ill. 2d 273, 275, 226 N.E.2d 630, 633 (1967).

266. *Id.* at 285, 226 N.E.2d at 638.

267. *Id.* at 284-85, 226 N.E.2d at 638.

268. *Id.* at 284, 226 N.E.2d at 638.

269. *Id.* at 281, 226 N.E.2d at 636.

270. *Id.* at 280, 226 N.E.2d at 635.

271. *Id.* at 284, 226 N.E.2d at 638.

272. *Id.*

the court imposed on the architect a duty of ensuring that the contractor did not violate the owner-contractor agreement and that safe and adequate construction methods were used²⁷³—an expansion of duty that neither party intended.

Justice House, dissenting in *Miller*, argued that the contract did not impose such a duty, but provided only for limited supervision,²⁷⁴ noting that in the contract the architect agreed to attempt to prevent defects, but specifically disclaimed any guarantee of the contractor's performance.²⁷⁵ Justice House acknowledged that the architect had a right to insist upon the safe and adequate use of construction methods, but argued that to transform the right into a duty was inconsistent with common usage and with the contract itself.²⁷⁶ An architect, according to Justice House, does not normally contract for continuous supervision, but if the duty to supervise construction methods is expanded, the architect will reflect the increased responsibility through an increase in fees, a cost that will ultimately be borne by the public.²⁷⁷ Finally, Justice House argued that an owner does not want such a duty imposed since it would result in chaos at the work site, with architects stopping work regularly—a result that is inefficient and costly to the owner.²⁷⁸

The effect of *Miller* is unclear. One writer considers the decision significant because it based the architect's duty to supervise construction methods solely upon the contract between the owner and the architect.²⁷⁹ This view is not accurate. The court in *Miller* looked at all the agreements, including the owner-contractor agreement. More important, the case is significant because it extended the architect's liability beyond that contemplated in the owner-architect agreement and, apparently, beyond the intent of the parties.²⁸⁰

Miller is inconsistent with the view that methods of construction are within the realm of the contractor's authority and control rather than the architect's.²⁸¹ It is also inconsistent with the view that contractors may be better able to control construction methods than architects, whose primary responsibility is design.²⁸² These inconsistencies have led some to believe that the courts have created a duty that "[requires] more than conduct reasonably to be expected of a prudent design professional and amounts, in effect, to liability without proof of negligence—strict liability."²⁸³

273. *Id.*

274. *Id.* at 293, 226 N.E.2d at 642 (House, J., dissenting).

275. *Id.*

276. *Id.* at 293-94, 226 N.E.2d at 643.

277. *Id.* at 295, 226 N.E.2d at 643. While there will be an increased cost no matter who bears the burden, deciding which party will bear the burden is important and can have significant ramifications. See *infra* text accompanying notes 340-44, 444-48 for a discussion of the architect's ability to allocate these costs and an argument indicating that costs to the public need not necessarily increase.

278. 37 Ill. 2d 273, 294, 226 N.E.2d 630, 643 (1967) (House, J., dissenting).

279. Note, *supra* note 7, at 252.

280. Carey, *Assessing Liability of Architects and Engineers for Construction Supervision*, 672 Ins. L.J. 147, 154 (1979).

281. See Note, *supra* note 7, at 250.

282. Interview with practicing engineer, Dayton, Ohio (December 28, 1982).

283. Note, *supra* note 16, at 1243; see also *infra* text subpart IV(A) (discussion of the strict liability theory).

The *Miller* decision has not been overruled, but a later Illinois case has distinguished *Miller*, finding that an architect did not have a duty to supervise construction methods.²⁸⁴ In *McGovern v. Standish*²⁸⁵ an injured employee of the contractor brought an action against the architect. The Illinois Supreme Court held that the architect was not liable to the worker because the architect did not have the right to control or direct methods of construction.²⁸⁶ The contract terms were similar to those in *Miller*, except that the architect did not have an express right to stop work.²⁸⁷ In *McGovern*, the court found that the architect did have the right to reject defective materials and require their correction, but did not have the right to stop work because it was being done in a dangerous manner.²⁸⁸

Although *McGovern* apparently held that no duty to supervise construction methods exists without a contractual right to stop work, the court did indicate some exceptions. The opinion implies that the existence of expansive authority vested with the architect may create a duty to workers and, further, that attempts to exercise control over the work by issuing orders or directions may create such a duty.²⁸⁹ Therefore, this decision does not establish nonliability based on carefully worded contracts. Instead, the opinion reflects the court's determination that in the circumstances of the *McGovern* case the architect did not have sufficient control to warrant imposing a duty, but that an architect could have such control even absent a right to stop work. Thus, strategic use of contract language may not protect the architect if the judiciary determines that liability should be extended.

The *Miller* decision is not an isolated case. In *Geer v. Bennett*²⁹⁰ a Florida appellate court held that an architect may be liable for his failure to direct the contractor to install a guardrail to prevent persons from falling from a twelve-foot high construction area. The plaintiff was injured in a fall from the construction area.²⁹¹ The court based the duty to supervise construction methods on the duty of "supervision" specified in the contract, although the contract did not give the architect the right to stop work.²⁹² The decision is a simple expansion of the duty established by the word "supervision," an analysis that holds an architect to a duty that neither party intended.

The expansion of duty has not been accepted by all courts. In *Reber v. Chandler High School District No. 202*²⁹³ an Arizona appellate court expressly rejected the *Miller* doctrine.²⁹⁴ *Reber* was an action by the contractor's employees against an owner and his architect for injuries sustained when a gymnasium under construction

284. *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976).

285. *Id.*

286. *Id.* at 69, 357 N.E.2d at 1142.

287. *Id.* at 63-65, 357 N.E.2d at 1139-40; see *supra* text accompanying notes 268-70.

288. 65 Ill. 2d 54, 68, 357 N.E.2d 1134, 1141 (1976).

289. *Id.* at 68-69, 357 N.E.2d at 1142.

290. 237 So. 2d 311 (Fla. Dist. Ct. App. 1970).

291. *Id.* at 313.

292. *Id.* at 313-14.

293. 13 Ariz. App. 133, 474 P.2d 852 (1970).

294. *Id.* at 135-36, 474 P.2d at 854-55; see *supra* text accompanying notes 263-73.

collapsed.²⁹⁵ The court held that the owner-contractor agreement can be used to settle ambiguities in the owner-architect agreement if the architect provided both agreements,²⁹⁶ but found that the contracts did not provide for the architect to exercise control over the method and manner of performing the details of the work.²⁹⁷ While the contract in *Reber* did not include the right to stop work, the court rejected the argument from *Miller* that such a right gives rise to a corresponding duty.²⁹⁸ The court held that "liability for negligent exercise of retained supervisory powers can attach only when there is a showing that a duty has been created by the [architect's] reservation of . . . 'the right to exercise day-by-day control over the manner in which the details of the work are performed.'"²⁹⁹

The absence of a right to stop work is apparently not the basis of the decision since the court expressly rejected *Miller* and adopted the view of the *Miller* dissent.³⁰⁰ Neither the contract in *Reber* nor that found in *Geer*³⁰¹ contained a right to stop work, yet the results of the two cases were different, presumably because, in *Reber*, the court determined that the duty should not be extended unless expressly assumed and undertaken by the architect.³⁰²

The doctrine established by *Miller*³⁰³ still has viability, and architects have been held to a duty of supervision of construction methods in cases subsequent to *Miller*.³⁰⁴ The trend established in *Miller* still appears predominant, but a movement has occurred away from the extensive duty of supervision set forth in *Miller* back to a consideration of the agreements on a more objective level.³⁰⁵ Recent decisions in some jurisdictions have adopted a less expansive view of the architect's duty to supervise. It is well recognized that the contract relationships between architect, owner, and contractor play an important role in determining whether an architect has

295. 13 Ariz. App. 133, 134, 474 P.2d 852, 853-54 (1970).

296. *Id.* at 136, 474 P.2d at 855.

297. *Id.* at 137, 474 P.2d at 856.

298. *Id.* at 135-36, 474 P.2d at 854-55.

299. *Id.* at 135, 474 P.2d at 854 (emphasis in original).

300. *Id.* at 135-36, 474 P.2d at 854-55 (citing *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967)). The dissenters in *Miller* believed that the contract required only limited supervision and that the contract should be interpreted to fulfill the intent of the parties. Justice House indicated that extensive supervisory powers should be based on clear enumeration of them in the contract and that in the typical contract, supervision only includes ensuring substantial conformity of the structure to the owner's requirements. 37 Ill. 2d 273, 293-95, 226 N.E.2d 630, 642-43 (1967) (House, J., dissenting).

301. See *supra* notes 292-98 and accompanying text.

302. 13 Ariz. App. 133, 135, 474 P.2d 852, 854 (1970).

303. See *supra* text accompanying notes 263-73.

304. See, e.g., *Duncan v. Pennington County Hous. Auth.*, 283 N.W.2d 546, 548-49 (S.D. 1979) (architect liable for site safety based on architect's contractual requirement of "obtain[ing] compliance with the contract documents" through on-site inspections).

305. See *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976). However, the court still relied on the overall circumstances and a review of the architect's role and authority rather than relying strictly on the agreement.

a duty to supervise construction methods for the protection of third parties. The intent of the parties is also recognized as an important consideration.³⁰⁶ Some recent cases have taken a narrow view of the contract so that it is interpreted to strictly conform to the intent of the parties.³⁰⁷

C. Architects' Attempts to Limit the Liability Arising from Supervision of Construction Methods.

Architects have responded to decisions such as *Miller* and *Geer* by attempting to limit their liability through changes in contract language. The current owner-architect contract form of the American Institute of Architects does not use the word "supervision."³⁰⁸ The form provides only for visits to the site, at intervals to be determined by the architect, to verify that the work is proceeding according to the contract.³⁰⁹ It also contains an express disclaimer providing that the architect is not responsible for construction methods, techniques, or safety precautions.³¹⁰ The contract also has omitted the "right to stop work," and retained only a right to reject work that does not conform to the contract documents.³¹¹

The effectiveness of these changes is uncertain. Architects have eliminated the word "supervision" from the contracts because they believe that it is too broad to describe architects' duties and it allows courts to hold architects responsible for many aspects of the construction process for which the architects did not intend to assume responsibility.³¹² The deletion of the word "supervision," however, may not make a substantial difference. Since architects still perform the same functions despite the reworded definition, a court, consistent with *Miller*,³¹³ may look beyond the language and impose a duty of supervision of construction methods on the architect.³¹⁴ Similarly, the deletion of the "right to stop work" may not have the desired effect

306. See *Wheeler & Lewis v. Slifer*, 195 Colo. 291, 577 P.2d 1092 (1978) (intent is critical determination); *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221 (Iowa 1974) (right to inspect work for conformity with plans and right to stop work if provisions of contract are not carried out does not constitute retention of control sufficient to hold inspection engineer liable to contractor's employees); *Duggan v. Arnold N. May Builders, Inc.*, 33 Wis. 2d 49, 146 N.W.2d 410 (1966) (architect held to no supervisory duty at all).

307. *Wheeler & Lewis v. Slifer*, 195 Colo. 291, 577 P.2d 1092 (1978); *Fruzyna v. Walter C. Carlson Assocs., Inc.*, 78 Ill. App. 3d 1050, 398 N.E.2d 60 (1979); *Krieger v. J.E. Greiner Co.*, 282 Md. 50, 382 A.2d 1069 (1978); *Moundsview Indep. School Dist. No. 621 v. Buetow & Assocs., Inc.*, 253 N.W.2d 836 (Minn. 1977); *Brown v. Gamble Constr. Co.*, 537 S.W.2d 685 (Mo. Ct. App. 1976); *Porter v. Stevens, Thompson & Runyan, Inc.*, 24 Wash. App. 624, 602 P.2d 1192 (1979); *Luterbach v. Mochon, Schutte, Hackworthy, Juerison, Inc.*, 84 Wis. 2d 1, 267 N.W.2d 13 (1978); *Vonasek v. Hirsch & Stevens, Inc.*, 65 Wis. 2d 1, 221 N.W.2d 815 (1974).

308. AIA Document B141/CM, *supra* note 26.

309. *Id.* § 1.5.4.

310. *Id.* § 1.5.5.

311. *Id.* § 1.5.12.

312. *Types of Professional Liability Claims*, *supra* note 245, at Special Studies—5(3).

313. 37 Ill. 2d 273, 226 N.E.2d 630 (1967); see *supra* text accompanying notes 263–73.

314. See *supra* text accompanying notes 279–80, 288–89; see also *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976). But see *Reber v. Chandler High School Dist. No. 202*, 13 Ariz. App. 133, 474 P.2d 852 (1970).

since the architect still retains the same functions at the work site, and the power to "reject work"³¹⁵ may be interpreted to be substantially equivalent to the power to stop work. Last, the express disclaimers in the current form contracts³¹⁶ are similar to provisions in earlier contracts, provisions that the courts have given little or no effect.³¹⁷

If, as the cases indicate, the courts base the duty of supervision on the role of the architect and the control that he has,³¹⁸ the change in contract language will have little effect. The outcome will instead depend on the architect's control and the willingness of a court to expand the architect's liability. Given the traditional role of the architect in the construction process, it may be very easy for a court to determine that an architect had sufficient authority and control to justify imposing a duty to supervise construction methods, techniques, and site safety. Architects must be aware of this expansive view of their roles and responsibilities. Architects must also be aware of other theories that impose liability to third parties on them.

IV. OTHER THEORIES OF LIABILITY

A. *Strict Liability*

As noted earlier, strict liability was the rule applied to architects in the early Babylonian and Roman civilizations.³¹⁹ A strict liability theory does not require negligence, but does require an act or omission, an injury, and a proximate cause relationship between the act and the injury.³²⁰ Strict liability theory is most commonly applied in suits such as those against mass manufacturers because of the problems the injured plaintiff would encounter in attempting to prove a negligent act.³²¹ It is difficult, if not impossible, for an injured consumer to trace back through the channel of trade to the source of production and then discover the origin of the defect.³²² Moreover, the disparity in position and bargaining power between the manufacturer and the consumer forces the consumer to depend entirely on the manufacturer for a safe product.³²³

The general rule today, however, is that strict liability is not applicable to persons providing professional services.³²⁴ Ordinarily, strict liability is not applied to

315. AIA Document B141/CM, *supra* note 26, § 1.5.12.

316. *Id.* § 1.5.5.

317. *See, e.g.*, *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967). *Miller* dealt with a contract with a disclaimer similar to those currently used, but the court apparently refused to give the disclaimer any effect. *See supra* text accompanying notes 269-75.

318. *See, e.g.*, *Geer v. Bennett*, 237 So. 2d 311 (Fla. Dist. Ct. App. 1970); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976); *see also supra* text accompanying notes 263-92.

319. *See supra* text accompanying notes 1-6.

320. *See W. PROSSER, supra* note 9, § 75, at 494-95.

321. *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942 (3d Cir. 1968).

322. *Id.*

323. *Id.*

324. *Id.* at 942-43 (contractor); *K-Mart Corp. v. Midcon Realty Group, Ltd.*, 489 F. Supp. 813, 816 (D. Conn. 1980) (strict liability not applicable to architect for defective design); *Allied Properties v. John A. Blume & Assocs., Eng'rs*, 25 Cal. App. 3d 848, 856, 102 Cal. Rptr. 259, 264 (1972) (engineers); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 162, 222 N.E.2d 584, 589 (1966) (engineers who provided architectural designs).

architects because negligence can be proved.³²⁵ In the recent case of *K-Mart Corp. v. Midcon Realty Group, Ltd.*³²⁶ a merchant asserted a strict liability theory against the architect who had designed the store the merchant occupied because the roof of the store had collapsed.³²⁷ The federal district court held, first, that the strict liability theory is not applicable to professional services³²⁸ and, second, that assuming *arguendo* that the designs were "products" sold by the architect, the merchant did not use the products in the condition in which they were sold—he used the building, not the plans.³²⁹ The court noted that strict liability theory was intended to apply to "those who market defective products to the general public in a mass-distribution context."³³⁰ The court also recognized, however, that the doctrine of strict liability could apply to "the design and development of buildings which, like ordinary consumer products, are mass marketed to the public."³³¹

Despite the majority rule against application of strict liability to professional services, at least two jurisdictions have applied strict liability to design professionals.³³² *Schipper v. Levitt & Sons, Inc.*³³³ is the leading case imposing strict liability on a design professional. This case dealt with a designer of mass-produced homes who was also the developer and builder.³³⁴ The court held that the designer could be held liable under a strict liability theory for injuries to a child caused by the defective design of a home,³³⁵ analogizing the defendant designer to a mass-production manufacturer.³³⁶ *Schipper* appears to have little applicability to the other architect liability cases because it was based on the mass production of the homes and the complete role played by the defendant as designer, developer, and builder. In general, the rule remains that strict liability is not applicable to architectural services.³³⁷

In determining whether strict liability may or should be applied to design professionals, an examination of the policy arguments justifying its application to manufacturers is critical. The first justification is the difficult burden of proof that a consumer of mass-produced items would bear in a negligence action. It may be impossible for such a consumer to trace a defective item back through the distribution

325. *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942 (3d Cir. 1968).

326. 489 F. Supp. 813 (D. Conn. 1980).

327. *Id.* at 814. The architect had sold the designs to the builder, Midcon Realty.

328. *Id.* at 816.

329. *Id.* at 817. This requirement of using the "product" in the condition in which it was sold is an element of strict liability theory as applied to the sale of goods. *Id.*

330. *Id.* at 818.

331. *Id.*

332. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). The Supreme Court of South Carolina imposed a warranty on the designer of a frozen-food locker facility, applying the theory that furnishing plans for a contractor warrants that the plans are sufficient. Imposition of the warranty amounted to the application of a strict liability theory.

333. 44 N.J. 70, 207 A.2d 314 (1965).

334. *Id.* at 80, 207 A.2d at 320.

335. *Id.* at 96, 207 A.2d at 328.

336. *Id.* at 90-91, 207 A.2d at 325.

337. See *supra* note 324.

and production systems of a manufacturer.³³⁸ This justification is clearly inapplicable when one-of-a-kind projects are at issue and the alleged defect is in the design of a single product rather than a mass-produced product.³³⁹ In such design cases, an injured party knows where to go to find a defect and is not presented with a long and technical process to trace production back to its early stages. Therefore, application of strict liability to architects is not justified on the basis of an onerous burden of proof.

The second policy argument for applying strict liability to manufacturers is that the economic burden on the injured party may be immense and cannot be allocated to others, while the manufacturers are capable of allocating the risk of loss since they can pass the cost on to the customers who benefit from the product.³⁴⁰ This argument appears to apply to architects, and one commentator argues that the design professional is the most capable of bearing the loss by passing the cost on to his customers,³⁴¹ but the owner is actually more capable than the architect. The owner created the demand for the construction and can pass the cost directly on to the "ultimate risk-creator"—the owner's customers.³⁴² If the architect passes the cost on to his small client base of owners, the owners presumably will pass this cost on to their customers. Thus, the ultimate result is the same.

The method by which this result occurs, however, has different effects on the parties. If the cost is placed on an owner, then he by necessity will pass this cost on to his customers. The danger in this direct passing of the cost is that the customers will be inhibited in their consumption of the product (the structure). The effect, however, is more damaging when the architect attempts to pass on this cost. The cost to the architect is the cost of liability insurance,³⁴³ and the architect will attempt to transfer this cost to the owner. The owner, however, may not be willing to accept it. Instead, the owner may seek an architect with a lower fee. Another architect may be able to lower his fee by "going bare" (*i.e.*, practicing without liability insurance).³⁴⁴ Therefore, the architect who increases his fees when his responsibilities are increased may be undercut by the architect who reduces his costs by practicing without insurance or with only limited protection.

The architect is thus faced with two alternatives, either of which could be economically disastrous. First, he could assume the new responsibilities without increasing his fees, but this could cause such losses that the architect could not continue in business. Second, he could raise fees, but if he is underbid by other architects who could maintain lower costs by carrying less liability insurance, the

338. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

339. Note, *supra* note 16, at 1244.

340. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); see *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 91, 207 A.2d 314, 326 (1965); see also Note, *supra* note 16, at 1244.

341. Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361, 1379-91 (1967).

342. Note, *supra* note 16, at 1245.

343. See *infra* text accompanying notes 444-45.

344. See Berreby, *Architects: After the Fall*, Nat'l L.J., July 19, 1982, at 1, 31, col. 4.

result would be disastrous. One result of increasing fees is that some customers would choose to forego the expense. For the owner with a broad client base, the loss of a few customers may not be a problem, but if an architect with a small client base loses even one customer, he could be losing a significant percentage of his business.

The third policy argument for strict liability is one of deterrence. A manufacturer has an interest in avoiding monetary loss and the loss of good will through damage claims. Therefore, the threat of civil suits with no requirement of fault serves as an inducement for the manufacturer to take precautions to minimize injuries to customers.³⁴⁵ This policy appears valid for architects, but the effectiveness of the deterrent will depend on the extent of the architect's control. If strict liability is to serve as a deterrent to negligence at the construction level, it should be imposed on the party who is in the best position to control and prevent the creation of unnecessary risks of harm to third parties. While the architect does possess some technical skills appropriate to the construction process, the contractor, by virtue of his position in the construction process, is better able to effectively prevent errors at the construction level. The contractor is concerned primarily with construction, while the architect is concerned primarily with design and only secondarily with construction. Thus, the architect is a poor choice for controlling the construction process.³⁴⁶

Once a project is completed, the owner is in a better position than the architect to discover and correct defects. Although the architect has the skills to discover defects, he is no longer associated with the structure. To hold that the architect has sufficient control to serve as an effective target for deterrence would be to assume that an architect routinely inspects all his structures after completion, an assumption that is both inaccurate and unreasonable. The owner also has control over the economic elements such as financing. These economic considerations often lead to improper construction and other problems.³⁴⁷

The imposition of strict liability on architects may seem appropriate for deterring the production of structures that are dangerous or unsuited for their intended purposes. This view, however, ignores the distinctions between the manufacturing process and the construction process.³⁴⁸ Quality control on a construction project is more difficult than on a production line for two reasons. First, a manufacturer has physical control of a usually repetitive production process. Construction projects, however, are unique situations with no opportunity to develop control tests within the process. Second, a manufacturer can control the human element of production in a relatively

345. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467-68, 150 P.2d 436, 443-44 (1944) (Traynor, J., concurring).

346. Design professionals, however, have been held liable for negligence in connection with construction. See generally *supra* text accompanying notes 234-307.

347. An example of the exercise of economic control is the decision to use the "'fast track' method, a fairly common procedure in which construction proceeds before all drawings are complete." Wall St. J., Oct. 8, 1982, at 16, col. 1 (article discussing the collapse of the skywalks at the Hyatt Regency in Kansas City). The owner, who has economic control, will be the one to make the decision to use a "fast track" method, which may result in improper construction.

348. Note, *supra* note 16, at 1247.

permanent and fixed environment, but the architect must deal with numerous sub-contractors and construction workers with whom he may never have worked before.³⁴⁹ Thus, the architect clearly lacks control over the human element of production.

The role of the architect as a designer provides him with considerable control over the preparation of the plans and specifications, but his control during the construction phase is not sufficient to make him an appropriate target for deterring construction defects. Thus, a deterrence policy does not justify imposing strict liability on architects.

Application of a strict liability theory to an architect's designs would require that the architect produce a perfect set of plans. By the very nature of the profession, this requirement would be unreasonable. An architect is operating in areas of uncertainty, with a premium placed on creativity. To demand creativity and perfection from the architect is to require a standard that cannot realistically be achieved.

The doctrine of strict liability is not appropriate for architects, and the general rule of nonapplicability is correct.³⁵⁰ While exceptions to the majority rule exist,³⁵¹ the cases indicate that the exceptions are based largely on particular facts and circumstances, and architects generally are not held liable under a traditional strict liability theory.

B. Breach of Warranty

Warranty theory has limited application to third parties since most warranty claims rely on implied warranties by the architect to the owner.³⁵² When defective products have been at issue, manufacturers often have been held liable for a breach of an implied warranty,³⁵³ but the courts are generally hesitant to hold an architect liable for breach of an implied warranty.³⁵⁴ The general rule is that the architect is not a warrantor or guarantor.³⁵⁵ An exception to this general rule is the holding of a minority of courts that a design professional, by undertaking to furnish plans and specifications, warrants their sufficiency for the intended purpose.³⁵⁶ Such a warranty, however, is not a warranty of no defects. Another exception arises from cases in which an architect has expressly warranted his plans and work.³⁵⁷

349. *Id.*

350. For a discussion of the inapplicability of strict liability to service professions based on the RESTATEMENT (SECOND) OF TORTS § 402A (1964), see Comment, *supra* note 13, at 81.

351. See *supra* note 332.

352. See, e.g., *Broyles v. Brown Eng'g Co.*, 275 Ala. 35, 151 So. 2d 767 (1963).

353. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

354. See *Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Assocs., Inc.*, 168 So. 2d 333 (Fla. Dist. Ct. App. 1964); *Ryan v. Morgan Spear Assocs., Inc.*, 546 S.W.2d 678 (Tex. Civ. App. 1977).

355. See *Bayne v. Everham*, 197 Mich. 181, 199-200, 163 N.W. 1002, 1008 (1917); *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 361-62, 164 A.2d 201, 203 (1960).

356. *Broyles v. Brown Eng'g Co.*, 275 Ala. 35, 151 So. 2d 767 (1963); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); *Niver v. Nash*, 7 Wash. 558, 35 P. 380 (1893).

357. See *Smallwood v. Pettit-Galloway Co.*, 187 Ark. 379, 59 S.W.2d 1031 (1933); *City of McPherson v. Stucker*, 122 Kan. 595, 256 P. 963 (1927); *Gould v. McCormick*, 75 Wash. 61, 134 P. 676 (1913).

A Florida appellate court in *Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc.*,³⁵⁸ clearly stated the majority rule, holding that a design professional "does not 'warrant' his services . . . to be 'merchantable' or 'fit for an intended use.'"³⁵⁹ Such terms, said the court, are applicable only to goods.³⁶⁰ The design professional only "'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect."³⁶¹ In *Allied Properties v. John A. Blume & Associates, Engineers*,³⁶² a California appellate court affirmed this view. The court held that "where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply."³⁶³ Relying on the reasonable expectations of the parties, the court continued, "[t]hose who hire [design professionals] are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."³⁶⁴

*Broyles v. Brown Engineering Co.*³⁶⁵ more specifically set forth a basis for refusing to hold architects as guarantors. The Supreme Court of Alabama gave a detailed description of the architect's function that demonstrates the complexities and uncertainties involved.³⁶⁶ An architect must satisfy the practical and aesthetic requirements of a structure, while dealing in experimental and uncertain situations.³⁶⁷ Architects deal with uncertainties and make judgments based on less than perfect information. They have no clear answers and no clearly established guidelines. Given the state of the architect's practice, it would be inequitable to hold architects to a theory of implied warranty, and the courts apparently accept this view.³⁶⁸

C. Negligence Per Se

Many suits against architects contain an allegation that the architect failed to adhere to the mandate of a building code governing the project.³⁶⁹ This allegation raises the issue of whether the standard of care imposed on the architect requires

358. 168 So. 2d 333 (Fla. Dist. Ct. App. 1964).

359. *Id.* at 335.

360. *Id.*

361. *Id.*

362. 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972).

363. *Id.* at 855, 102 Cal. Rptr. at 264.

364. *Id.* at 855-56, 102 Cal. Rptr. at 264 (quoting *Gagne v. Bertran*, 43 Cal. 2d 481, 489-90, 275 P.2d 15, 21 (1954)).

365. 275 Ala. 35, 151 So. 2d 767 (1963).

366. *Id.* at 39-40, 151 So. 2d at 771-72.

367. See *supra* text accompanying note 149 for the complete statement by the court.

368. See, e.g., *Allied Properties v. John A. Blume & Assocs., Eng'rs*, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972); *Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Assocs., Inc.*, 168 So. 2d 333 (Fla. Dist. Ct. App. 1964); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); *Ryan v. Morgan Spear Assocs., Inc.*, 546 S.W.2d 678 (Tex. Civ. App. 1977).

369. Akin, *Negligence Per Se: Architects and Engineers—Beware!*, in *GUIDELINES FOR IMPROVING PRACTICE at General Information—10* (Victor O. Schinnerer & Co. ed. 1972).

compliance with building codes. Some cases have apparently held that it does and that the pertinent statute may require a standard higher than the common-law negligence standard.³⁷⁰

Failure to satisfy the statute may be negligence per se—negligence as a matter of law. Negligence per se is the breach of a duty imposed by a statute and constitutes negligence without reference to the degree of care exercised or the foreseeability of the injury.³⁷¹ Negligence per se is similar to the strict liability theory in that both impose liability without common-law negligence. The difference is that under strict liability a party is held liable based on the fact of an injury, while under negligence per se, liability is based on the failure to satisfy a statutory duty.

Although negligence per se is a critical theory in an architect's susceptibility to liability, it is subject to some limitations. The violation of a statute alone is not sufficient to constitute negligence per se. To prove an allegation of negligence per se, the plaintiff must show (1) that a violation of the statute or building code has occurred, (2) that the plaintiff is a member of the class of persons the statute or code was designed to protect, (3) that the injury is one the statute or code was designed to prevent, and (4) that the injury was proximately caused by the statutory violation.³⁷² The most difficult element for the plaintiff to prove in a claim of negligence per se is the element of proximate cause.

Another important question relating to negligence per se is whether compliance with a statute or building code is sufficient to meet the negligence standard of care as a matter of law. A Missouri case, *Monsour v. Excelsior Tobacco Co.*,³⁷³ held that compliance with a statutory standard may satisfy the negligence standard as a matter of law. Unless the statute clearly establishes an absolute duty, however, the statute may be viewed as only a minimum standard under which compliance alone may not be sufficient to satisfy the negligence standard of care.³⁷⁴ The question is one of interpretation of whether the statute was intended to establish a minimum or an absolute duty. Speculation on statutory intent can be dangerous, and one should not assume that compliance will satisfy a negligence standard. The architect should maintain the ordinary and necessary standard of care and also be sure to comply with all applicable statutes and codes.

Even absent a finding of negligence per se from the failure to satisfy a statutory requirement, the architect should be aware that juries may be instructed that failure to satisfy a statute can be considered in determining whether the architect satisfied the common-law negligence standard of care.³⁷⁵ A jury may believe that, given the

370. See *Burran v. Dambold*, 422 F.2d 133 (10th Cir. 1970); *Johnson v. Salem Title Co.*, 246 Or. 409, 425 P.2d 519 (1967).

371. Akin, *supra* note 369, at General Information—10(1).

372. See *Sayers v. Haushalter*, 493 S.W.2d 406, 409 (Mo. Ct. App. 1973); W. PROSSER, *supra* note 9, § 36.

373. 115 S.W.2d 219 (Mo. Ct. App. 1938), *aff'd*, 144 S.W.2d 62 (Mo. 1940).

374. See *id.* at 223; see also W. PROSSER, *supra* note 9, § 36, at 201-02.

375. Davidson, *supra* note 135, at 22.

failure of an architect to satisfy a statutory duty, the architect has not exercised reasonable professional care.³⁷⁶ Therefore, architects should remember that a violation of a statutory duty may be regarded as evidence of a negligent failure to meet the professional standard of care, even when it is not conclusive on the issue.

D. Punitive Damages

Although damages are not a legal theory of liability, they bear consideration in a discussion of an architect's liability to third parties since the effects of allowing punitive damages can be devastating to architects.

The general purpose of punitive damages is to punish the wrongdoer and deter similar actions in the future.³⁷⁷ A criminal act frequently will support an award of punitive damages.³⁷⁸ In addition, several other types of conduct, such as intentional acts, gross negligence, and other acts that constitute more than mere negligence, may support punitive damage awards.³⁷⁹ The general rules on punitive damages are so flexible that any court could hold an architect liable for punitive damages "under the right circumstances."³⁸⁰

At present no decisions have assessed punitive damages against an architect, but three questions remain unanswered. First, will the architect be exposed to punitive damages in the future? Second, under what circumstances might an architect be exposed to punitive damages? Third, to what extent would these punitive damages be insurable?

Other professionals, such as physicians, have already been subjected to punitive damage awards.³⁸¹ Medical cases can be distinguished from suits against architects, however, because of the close personal relationship between physicians and patients, a relationship that clearly does not exist between architects and third parties.

The clearest danger of punitive damages arises when an architect commits a criminal error or omission.³⁸² This danger demonstrates the importance of being aware of statutory requirements since some may impose criminal status.³⁸³ Punitive damages also may be applied when an architect is held to have knowingly done something contrary to good practice or in violation of a noncriminal building code. Such a case would arise if an architect knew of a defect, but chose to ignore it because it was expedient to do so, or if an architect knowingly cut corners to save money, thereby building an unsafe structure.

376. *Id.*

377. 3 PERSONAL INJURY § 2.02 (L. Frumer, R. Benoit, & M. Friedman ed. 1965).

378. *See, e.g.,* Watkins v. Layton, 182 Kan. 702, 707, 324 P.2d 130, 135 (1958).

379. 25 C.J.S. Damages § 123(1) (1966).

380. Kaskell, *A/E Exposure to Punitive Damages—Assessment and Insurability*, in GUIDELINES FOR IMPROVING PRACTICE at Special Studies—7,—7(1) (Victor O. Schinnerer & Co. ed. 1981).

381. *See* Wilson N. Jones Memorial Hosp. v. Davis, 553 S.W.2d 180 (Tex. Civ. App. 1977).

382. One example would be if an architect were so grossly negligent that he could be charged with general homicide. This would be analogous to a criminal charge for gross negligence in driving an automobile. Another example would be if an architect acted with such knowing disregard for a third party's safety that a criminal charge could be supported and, consequently, a request for punitive damages could be granted. *See* Kaskell, *supra* note 380, at Special Studies—7(2).

383. *Id.*

Failure to realize the potential applicability of punitive damages could spell economic disaster for an architect, particularly in light of the uncertain status of the insurability of these damages. Some liability insurance policies provide coverage only for liability based on the ground of negligence.³⁸⁴ To the extent that insurance carriers can phrase the policy to exclude intentional acts, damages for these acts will be excluded from coverage.³⁸⁵ Even if a policy covers punitive damages, the courts may not uphold the coverage for public policy reasons.³⁸⁶ Some states, however, do not permit insurance carriers to exclude coverage for punitive damages.³⁸⁷

Clearly, punitive damages could easily be applied to an architect, and because the ability to insure against these damages is uncertain, an architect could be subjected to great economic hardship. The result is that architects must pay close attention to statutory requirements and do their utmost to exercise the reasonable professional standard of care. The architect must also avoid excessive risks that may later be classified as basic or knowing breaches of his duty to third parties, breaches that may result in punitive damages.

V. THE ARCHITECT'S DEFENSES

The architect is subject to liability to third parties from a variety of sources, and that liability has been expanding as courts seek to provide recovery for injured parties. While the legal position of the architect appears, at best, to be uncertain and offers a less than bright prospect for the future, the architect is not without protection. Although the defenses of privity of contract³⁸⁸ and owner acceptance³⁸⁹ have been effectively abolished, some defenses are still available. One of the most important of the architect's shields is a special statute of limitations, which was discussed earlier,³⁹⁰ but this is not the exclusive source of shelter for the architect.

A. Basic Negligence Defenses

The most common allegation against the architect is that of negligence. This may be a claim of negligent preparation of plans and specifications,³⁹¹ or an allegation of a negligently exercised duty of supervision.³⁹² Whenever an architect is sued on a negligence theory, his most obvious defense is to deny the existence of one of the four negligence elements³⁹³—duty, breach, proximate cause, or damage.³⁹⁴ The injured party who alleged the negligence has the burden of proving the existence of these four elements.

384. *Id.* at Special Studies—7(3).

385. *Id.*

386. *See American Sur. Co. v. Gold*, 375 F.2d 523, 525 (10th Cir. 1967) (court stated that insuring against punitive damages would violate the public policy of the state).

387. Kaskell, *supra* note 380, at Special Studies—7(3).

388. *See supra* subpart II(A).

389. *See supra* subpart II(B).

390. *See supra* text accompanying notes 86–106.

391. *See supra* subpart III(B).

392. *See supra* subpart III(C).

393. *See supra* subpart III(A).

394. *See supra* note 123 and accompanying text.

The proximate cause element of negligence theory is probably the most difficult for the plaintiff to prove. If the plaintiff cannot establish a sufficient causal connection between the alleged negligent act or omission and the injury sustained, the architect will not be held liable.³⁹⁵ Moreover, proximate cause requires a causal connection that is more than just ultimate causation. The court must make a determination of whether the causal relationship is sufficient to attach liability, a decision that is based on the balancing of policy considerations. Some considerations are the moral blame of the architect's actions, the prevention of future harm, the social impact of imposing liability, the burden on the architect and the architectural profession, and the architect's ability to bear the loss.³⁹⁶ These policy considerations are similar to those applied in the foreseeability test of duty, and the questions of foreseeability and proximate cause often merge into a single balancing process.

In defense, the architect can claim that the alleged negligence was not the proximate cause of the injury. The architect may allege, after a structure is completed, that the owner's negligent maintenance was the proximate cause of the injury and that his own negligence was only remotely related to the injury sustained by the plaintiff. Such a claim would be particularly applicable when the owner had found a defect in the structure, but failed to remedy it. In this situation, the architect has a persuasive argument that it was the owner's negligent failure to maintain and repair the structure that was the proximate cause of the third party's injuries even though the architect's actions may also have been a cause of the injuries. The absence of proximate cause may result in a finding of nonliability despite a breach of duty by the architect.³⁹⁷

B. Contributory Negligence

The defense of contributory negligence is often raised in personal injury suits brought by third parties against architects.³⁹⁸ In some jurisdictions contributory negligence completely absolves the design professional from liability to a negligent third party.³⁹⁹ In comparative negligence jurisdictions successful assertion of the defense of contributory negligence results in a reduction of the third party's recovery.⁴⁰⁰

The defense of contributory negligence, then, may be effective to bar a suit or reduce recovery against the architect if he can show that the injured party's negligence caused or contributed to the injury.⁴⁰¹ This theory is based on the view that the

395. See *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir. 1971).

396. See *supra* text accompanying notes 55-61.

397. See, e.g., *Day v. National U.S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961).

398. See, e.g., *Johnson v. Equip. Specialists, Inc.*, 58 Ill. App. 3d 133, 373 N.E.2d 837 (1978) (builder-designer).

399. See, e.g., *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (plaintiff denied recovery based on the defect being patent (known)). But see the discussion of the latent defects limitation, *supra* text accompanying notes 46-48.

400. W. PROSSER, *supra* note 9, § 67, at 434-36. In a comparative negligence state relative fault is determined, and damages are based on this finding. For instance, if a defendant is found to be 60% negligent and the plaintiff 40% negligent, the plaintiff can only recover 60% of the damages sustained. *Id.*

401. See *Johnson v. Equip. Specialists, Inc.*, 58 Ill. App. 3d 133, 141, 373 N.E.2d 837, 843 (1978).

architect should not be fully liable for injuries to a third party who possibly could have prevented the injury if he had not been negligent.⁴⁰²

C. Contribution or Indemnity

Contribution is not a defense in the strictest sense; it does not preclude the architect's liability, but it does allow the architect to limit his liability.⁴⁰³ If an architect successfully asserts a claim for contribution against another party, that party is required to pay part or all of the damages assessed against the architect. A contractor who built from patently defective plans and an owner who could have prevented an injury because he knew of the defect, but failed to do so, are both candidates for contribution.⁴⁰⁴ A showing of negligent maintenance by the owner may also constitute grounds for contribution. Moreover, although the owner's advance approval of plans does not absolve the architect of liability,⁴⁰⁵ the approval may be a basis for a claim of contribution against the owner. It is important that an architect be aware of this possibility of mitigating damages so that all potential parties may be joined in the action for claims of contribution.

Indemnity, like contribution, is not a defense, but is an attempt to shift the economic burden of the loss to a party whose fault is greater. Indemnity may arise by operation of law to prevent an unjust result. For example, when a nonnegligent architect is held liable for his consulting engineer's negligence because the engineer is the agent of the architect, the architect may seek indemnity from the engineer.⁴⁰⁶ Some jurisdictions are liberal in allowing indemnity by operation of law.⁴⁰⁷

An allowance of indemnity may depend on a "'passive-active' dichotomy."⁴⁰⁸ A party is "actively negligent if he had the 'active or primary role in the negligent situation' while he [is] passively negligent if he had only a 'secondary role.'"⁴⁰⁹ Indemnity may be denied unless the party held liable can show that he was a passive tortfeasor while the other party was an active tortfeasor. If both were active tortfeasors, indemnity may be denied.⁴¹⁰

In the construction area, indemnification arises most often from a contractual agreement.⁴¹¹ It is generally recognized that a contractor may agree to indemnify an

402. See generally W. PROSSER, *supra* note 9, § 65, at 417-18.

403. *Id.* § 50.

404. Comment, *supra* note 13, at 90.

405. See *supra* text accompanying notes 180-82.

406. See *American S. Ins. Co. v. Dime Taxi Serv.*, 275 Ala. 51, 151 So. 2d 783 (1963).

407. See *Fulton Ins. Co. v. White Motor Corp.*, 261 Or. 206, 493 P.2d 138 (1972).

408. Comment, *supra* note 13, at 90.

409. *Id.* at 90 n.117 (citing *Hays-Fendler Constr. Co. v. Traroloc Inv. Co.*, 521 S.W.2d 171, 177 n.8 (Mo. Ct. App. 1975)).

410. See *Union Elec. Co. v. Magary*, 373 S.W.2d 16 (Mo. 1963); *Pierce v. Ozark Border Elec. Coop.*, 378 S.W.2d 504 (Mo. 1964).

411. E.g., AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 4.18 (AIA Document A201/CM) (1980) (provides for the contractor to indemnify the owner and architect for losses due solely or partly to the contractor's negligence, subject to some limitations) [hereinafter cited as AIA Document A201/CM], reprinted in J. LAMBERT & L. WHITE, HANDBOOK OF MODERN CONSTRUCTION LAW at 260, 270 (1982).

architect against the result of the architect's negligence, but clear and unequivocal language of this intent is required.⁴¹² The American Institute of Architects has promulgated a form for such a provision.⁴¹³ Some states, however, will not allow a party to seek contractual indemnification for negligence.⁴¹⁴

Even if a valid contractual provision provides for indemnification, indemnification may be denied on the basis of the passive-active dichotomy. If a party is an active tortfeasor, he may be denied indemnity and granted only contribution even if a contractual provision grants him indemnification.⁴¹⁵ Again, it is important that the defendant architect join all parties as third-party defendants in an attempt to provide for indemnification or contribution when a joint judgment is required.⁴¹⁶

D. Statutory Responses

The most important and effective statutory response has been the special statutes of limitations enacted by the state legislatures.⁴¹⁷ These statutes have provided an effective shield for the architect, but they are not the only possible solution, and other possible legislative responses should be considered.

One commentator, Milton F. Lunch, has suggested other statutory responses that would alleviate the liability burden currently placed on design professionals.⁴¹⁸ The first recommendation is to require pretrial arbitration before an arbitration panel made up of three members: a member of the defendant's profession, a lay member, and an attorney.⁴¹⁹ The panel would hear the case and then determine liability and the amount of any award.⁴²⁰ If either party were dissatisfied, he could seek a de novo procedure from a trial court, in which the panel's finding would be admissible as evidence.⁴²¹ Lunch argued that the panel would "weed out" cases without merit and provide fair awards better than juries would.⁴²²

This suggestion does have drawbacks, as Lunch recognized.⁴²³ First, duplicate costs would be incurred whenever a trial was requested.⁴²⁴ Second, the constitutionality of a mandatory nonjudicial proceeding prior to suit in court is uncertain since it would be a condition precedent to the right to file a claim in court.⁴²⁵ Some

412. See *Kansas City Power & Light Co. v. Federal Constr. Corp.*, 351 S.W.2d 741 (Mo. 1961).

413. AIA Document A201/CM, *supra* note 411, § 4.18.

414. See, e.g., *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1974).

415. See *Hays-Fendler Constr. Co. v. Traroloc Inv. Co.*, 521 S.W.2d 171, 176-77 nn.7-8 (Mo. 1975); see also *supra* text accompanying notes 408-10.

416. Comment, *supra* note 13, at 91.

417. See *supra* text accompanying notes 86-106.

418. Lunch, *The Professional Liability Shuffle*, in *GUIDELINES FOR IMPROVING PRACTICE at General Information—27* (Victor O. Schinnerer & Co. ed. 1977).

419. *Id.* at General Information—27(1).

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*; see *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). The court held that the establishment of review panels to hear medical malpractice claims was unconstitutional since it gave judicial functions to nonjudicial personnel. *Id.* at 322, 347 N.E.2d at 740. Further, the court held that the review panels constituted a denial of the constitutional right to a trial by jury, even though the aggrieved party could take the issue to a jury trial after the panel's

courts have upheld the creation of pretrial arbitration panels in medical malpractice cases, but this holding may not be applicable to architects because the courts have based their decisions on special circumstances in the medical malpractice area.⁴²⁶ The medical arbitration boards were designed to facilitate the disposition of the multitude of claims being filed and "to deal comprehensively with the critical threat to the health and welfare of the State as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates."⁴²⁷ Legislatures may not view the position of the architectural profession as sufficiently critical to justify the use of mandatory arbitration panels.

Another way to alleviate architects' liability would be to amend the workers' compensation laws⁴²⁸ to extend coverage to third-party defendants, including architects, who are not currently covered by the statutes.⁴²⁹ This amendment would limit the amount recoverable by an injured third-party worker to the amount provided for under the workers' compensation system and would bar workers' suits against architects. Such a change would probably call for a contribution to the program by the architect since employers who are protected by the system must pay for this protection. A further amendment could increase the damages allowed under the workers' compensation system so that workers will be less likely to seek a "deep pocket." These amendments would eliminate much of the litigation cost of third-party suits by substituting recovery under the workers' compensation system.

A third legislative response would be to place a dollar limit on the amount that is recoverable from an architect in a suit.⁴³⁰ This suggestion raises serious constitutional questions as a violation of the prohibition on special legislation since it would be an arbitrary limit that would discriminate against seriously injured persons.⁴³¹ A closely related suggestion is that limits could be included in the parties' agreements.⁴³² Such limitations, however, would not apply to third parties, and many courts may refuse to enforce the limits on the basis of a finding that such limitations are contrary to public policy.⁴³³

decision was rendered. *See id.* at 322-24, 347 N.E.2d at 740-41. *But see* Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981). These cases upheld mandatory arbitration for medical malpractice cases and rejected the constitutional challenges made. Further, a New York case found constitutional a statutory provision that allowed medical malpractice arbitration panel recommendations to be admitted as substantive evidence at a subsequent trial proceeding. *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976), *aff'd on other grounds*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977).

426. *See, e.g.*, *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976), *aff'd on other grounds*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977).

427. *Id.* at 314, 390 N.Y.S.2d at 129-30 (quoting Memorandum of State Executive Dept., N.Y. Legis. Ann. 419 (1975)).

428. Lunch, *supra* note 418, at General Information--27(2); *see supra* text accompanying notes 107-15.

429. Lunch, *supra* note 418, at General Information--27(2).

430. *Id.*

431. *See* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 329-30, 347 N.E.2d 736, 744 (1976). The court held that a \$500,000 limitation on medical malpractice recoveries was unconstitutional as special legislation that placed arbitrary limits on recoveries.

432. Lunch, *supra* note 418, at General Information--27(2)-(3).

433. *Id.*

A fourth proposal would alter the role that attorneys play in the litigation process by abolishing the use of contingent fees in cases of professional malpractice.⁴³⁴ This would lessen the plaintiff's incentive to sue and would result in suits only in those cases in which the injured party has a strong case. Contingent fees encourage suits in which the injured party may find a sympathetic court that is willing to extend the architect's liability to provide for recovery. Another suggestion is to allow counter-suits against an attorney who brings a frivolous suit resulting in unnecessary costs to the architect. Many states have rejected this idea except for circumstances in which malice on the part of the attorney is shown.⁴³⁵

These recommendations have found little, if any, implementation, and it is doubtful that they will be enacted in the near future. As a result, the architect must rely on the traditional defenses⁴³⁶ and the special statutes of limitations⁴³⁷ for protection.

VI. EFFECTS OF EXPANSIVE ARCHITECT LIABILITY

The discussion thus far has clearly demonstrated that the architect's liability, particularly his liability to third parties, has undergone expansion in the last thirty years. The architect's expanding liability to third parties arises from many sources and theories, and it presents an uncertain future for the architectural profession. The architect plainly provides a benefit to society, one that has been called "indispensable."⁴³⁸ One commentator said that "[e]very individual in the United States benefits from the services of a design professional. Without shelter, the enjoyment of food, clothing, rest and relaxation would be far less pleasant and questionably useful."⁴³⁹ The architect's designs provide both aesthetic beauty and structural soundness. Although injured third parties have an interest in being made whole, architects' contribution to society may call for a special balancing of the interests of architects and injured third parties.

The costs to the architect of expanding liability should be considered. An important cost is the loss of time that an architect must spend in defending against suits. While these costs are reasonable when an architect has clearly caused an injury to a third party, they are unreasonable when they are the result of suits that are tenuous or based on duties that should not be imposed on architects.⁴⁴⁰ An architect provides services, and his time is a valuable and important commodity that should not be dismissed lightly. Obviously, someone must pay for the loss of time. Society will

434. *Id.* at General Information—27(3).

435. *Id.*

436. *See supra* text accompanying notes 388–416.

437. *See supra* text accompanying notes 86–106.

438. Comment, *supra* note 13, at 97.

439. Comment, *Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. PRAC. & PROC. 287, 311–12 (1977).

440. *See supra* subpart III(C)(2) (discussion of the architect's duty to supervise construction methods).

ultimately bear the cost either in increased architectural costs or in unsafe structures resulting from the lack of time committed by the architects.⁴⁴¹

A second cost arises when the architects are held to ever increasing duties, duties that cause the architect to assume greater responsibilities.⁴⁴² If the architect undertakes more responsibility and provides more services, surely he will extract a premium in the form of higher fees. This cost will eventually be passed on to the consuming public.⁴⁴³ The increased construction costs will take their toll on society in two forms: (1) inability to afford construction and housing at the personal level, and (2) unwillingness to build and develop at the commercial level. The questions that society must ask are whether it wants to bear this cost, and, if so, whether the architect is the best person to allocate it.⁴⁴⁴

The most obvious cost to the architect is that of professional liability insurance. Although liability insurance is necessary to protect the architect and society, the cost of maintaining substantial coverage has been skyrocketing⁴⁴⁵ as the architect is subjected to more expansive liability. The cost has become so prohibitive that some architects have chosen to "go bare" (*i.e.*, practice without liability insurance).⁴⁴⁶ The high cost of insurance will be passed on to the public and the conscientious architect will be forced to either reduce his coverage or increase his fees and suffer the economic consequences. As more architects begin to "go bare," owners will seek out these architects because of their lower fees, thereby eliminating the necessity for owners to pass the cost on to their customers. In such a competitive market the architect must either suffer the loss of business or reduce his costs to compete with other architects who have liability insurance coverage. The result could be economically disastrous for the architect.⁴⁴⁷ Therefore, the architect is not in the best position to assume the allocation of these costs.

One could argue that the cost of assuring compensation to injured parties need not be passed on to the public if it is assumed by someone other than the architect. From the previous discussion it is clear that many of the duties being placed on architects are responsibilities previously borne by others.⁴⁴⁸ If the responsibility for activities beyond the design function are left to the contractor and owner, who traditionally bore them, then these parties would have no reason to increase their costs. However, since these responsibilities are new to the architect and are not currently included in an architect's fees, the architect burdened with these duties would necessarily have to increase fees and thus increase the overall construction costs.

441. See *infra* text accompanying notes 449–54 (discussion of the architect's new role in the construction process).

442. See *supra* subpart III(C)(2).

443. See *infra* text accompanying notes 447–49 for an argument that the public may not necessarily have to bear the additional costs.

444. See *supra* text accompanying notes 341–49 for a discussion of the relative ability of the architect to allocate costs and control the construction process or the structure. Although the discussion concerns the application of a strict liability theory, it is equally applicable to the issue presented here.

445. See Berreby, *supra* note 344, at 31, col. 4.

446. *Id.*

447. See *supra* text accompanying notes 340–45.

448. See *supra* text part II and subpart III(C).

Even if one assumes that the cost ultimately will be borne by the public no matter who assumes the responsibility, one must consider who is better able to allocate these costs. A limitation on the liability of architects to third parties would reduce the potential class of plaintiffs and might limit the number of large recoveries against architects.⁴⁴⁹ Injured parties should not be prevented from seeking recovery for their damages, but the architect's, the injured party's, and society's interests should be balanced. While an injured third party should be entitled to recovery, this recovery should not be premised on overexpansive views of the architect's role and abilities.

The diminishing role of the architect in the construction process is another costly effect of the expansion of liability. One commentator, while discussing the evolution of the architect's liability, pointed out the changing role of the architect when he said, "Once towering over the chain of command, demanding authority to control the work of virtually all who breathed life into their designs, architects now have withered into the shadows . . . , leaving to owners the task of overseeing the builders."⁴⁵⁰ Another commentator believes that the architect has not retreated from his traditional role,⁴⁵¹ but this view ignores the present realities of the architect's legal status.

The decisions that have extended the architect's duty, including the duty to supervise construction methods,⁴⁵² purport to be based on contractually imposed responsibilities, but in reality are based on the actual control exercised by the architect.⁴⁵³ Given this, the architect's only means of protection is to exercise less control, which can lead to catastrophic results. Some architects may attempt to reduce their exposure to liability by taking "a narrow view of their responsibilities" and relinquishing many powers, a result that could lead to even more unsafe structures and construction projects for which "[n]obody's in charge."⁴⁵⁴ Thus, a limited role for architects is clearly not in the best interest of society. Appropriate limits must be set on an architect's liability by balancing the interests of all concerned to determine the proper perspective on the architect's legal status.⁴⁵⁵

The most important and detrimental effect of the architect's new legal status is "the chilling effect on creativity."⁴⁵⁶ Architects are most vulnerable when they try new techniques or methods.⁴⁵⁷ Innovation is an essential element of the design

449. See Note, *supra* note 14, at 318-19. See *supra* text accompanying notes 53-61 for a discussion of foreseeability tests that balance the interests of all parties and may serve to limit the architect's liability.

450. Davidson, *supra* note 135, at 20.

451. *Types of Professional Liability Claims*, *supra* note 245, at Special Studies-5(3).

452. See generally *supra* text subpart III(C)(2).

453. See *Geer v. Bennett*, 237 So. 2d 311 (Fla. Dist. Ct. App. 1970); *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967). See also *supra* text accompanying notes 263-92 for a discussion of the rationales behind these decisions. Apparently control, rather than contract language, was the deciding factor.

454. Berreby, *supra* note 344, at 30, col. 1.

455. An example of the necessary balancing is the foreseeability test proposed by one commentator under which consideration is given to the architect, as well as the injured party. Note, *supra* note 14, at 318-19; see *supra* text accompanying notes 55-61.

456. Note, *supra* note 14, at 317.

457. *Id.*

profession, but it also opens the door to countless potential claims. The nature of the architectural profession is such that judgments are made based on uncertain conditions⁴⁵⁸ and the expansion of liability to third parties in such extremes can stifle architectural creativity. The architect must be permitted to be creative and must be given the discretion that he requires.⁴⁵⁹ If society is willing to sacrifice creativity, the result will be a design profession that produces only the most practical and efficient structures that can be planned without involving risks of any great degree. With simplicity and risk avoidance as the goals of the new breed of architects, this country will be relegated to a stagnated architectural profession that will avoid innovation at all costs.

VII. CONCLUSION

The legal status of architects has undergone considerable change throughout history. As civilizations developed, they recognized that the architect was being subjected to liability that was severe and excessive. The response was to provide the architect with ample protection, particularly against third-party actions. The courts and society later determined that architects were protected too well and began an assault on that protection, leaving architects subject to expanding liability to third parties. The fall of privity stripped the architect of his most effective defense, and the architect found himself open to third-party actions for negligence.⁴⁶⁰

The liability exposure expanded as the duty imposed on architects by the courts became higher. As a designer, the architect is liable for the negligent preparation of plans and specifications and has a duty to supervise to ensure that these plans and specifications are properly implemented. These two duties are appropriate since the architect is in the best position and is the most capable of effectuating these duties relating to design.⁴⁶¹

The extension of an architect's duty to include supervision of construction methods is not as easily justified. The emphasis of the architect is on design, not construction. Therefore, supervision of construction methods should not be an architect's responsibility. While changes in contract terminology might seem to be the answer, any court looking to expand the architect's duty to provide recovery for an injured third party would have little difficulty in going beyond the contract language.⁴⁶²

Courts and society have cut away at the architect's immunity until they are again close to applying a strict liability theory. Indeed, strict liability appears to be the next logical step since many of the standards and duties imposed on architects appear to require near perfection. This change in the architect's legal position is a result of the

458. See *supra* text accompanying note 149.

459. See *Peerless Ins. Co. v. Cerny & Assocs.*, 199 F. Supp. 951, 953 (D. Minn. 1961).

460. See *supra* parts I-II.

461. See *supra* subparts III(B), (C)(1).

462. See generally *supra* subpart III(C)(2).

change in social and judicial attitudes from a view favoring limitations on liability to a view that favors major expansions of the architect's duties and liabilities.

Given the judiciary's position favoring architectural liability, the architect has an uphill battle to fight in defending against an allegation of negligence. While the architect may seek limitation of his dollar losses through contribution and indemnity,⁴⁶³ this ignores the underlying problem. The legislatures recognized that liability had gone too far and enacted special statutes of limitations to limit the architect's exposure to liability.⁴⁶⁴ It is this type of recognition that society as a whole must make.

The architect has sought protection by limiting his authority and by taking a less active role in the construction process. The price that society pays is the construction of unsafe structures, higher construction costs, and a chilling effect on creativity. Society must acknowledge this and move for a change in attitudes toward a view that limits the duties of architects. By balancing all relevant elements, a middle ground can be reached that makes a rational and realistic appraisal of the injured party's interest in being made whole and the role of the architect in society. This more realistic view of the architect's role can result in a construction industry with the common goals of providing efficient and practical structures that are both safe and aesthetically pleasing.

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463. *See supra* subpart V(C).

464. *See supra* text accompanying notes 86-106.

